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IN THE

**Supreme Court  
of the United States**

OCTOBER TERM, 1961

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No. 291 Misc.

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ROBERT MORALES, ET AL.,  
*Petitioners*

VS.

CITY OF GALVESTON, ET. AL.,  
*Respondents*

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**RESPONDENT CITY OF GALVESTON'S REPLY  
TO PETITION FOR CERTIORARI**

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**TO THE HONORABLE THE CHIEF JUSTICE  
AND THE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES:**

Respondent City of Galveston denying jurisdiction as to it and denying error, respectfully prays that the Petition be denied.

## STATEMENT AND ARGUMENT

This suit was originally brought both against this Respondent, City of Galveston, as owner and operator of the grain elevator on charges of actual negligence and against the shipowner and operator, Cardigan Steamship Company, Ltd., on charges of unseaworthiness and, in addition, actual negligence. But as this case has unfolded, for practical purposes, it is now limited to a controversy between the Petitioner longshoremen and the Respondent Cardigan Shipping Company, Ltd. as to the application of the doctrine of unseaworthiness.

As to us—the City of Galveston—the Trial Court found we were not negligent as a matter of fact (181 F. Supp. 191). The Court of Appeals for the Fifth Circuit affirmed for us on these same fact questions.

This Court in remanding the case to the Court of Appeals dealt only with the controversy as between Petitioners and Cardigan. No reference was made to us. We are not involved in the subject matter of this Court's original opinion, i. e., the liability of a shipowner (364 U. S. 295).

A review of Petitioners present application discloses that we are not now substantially involved.

The three "Reasons Relied Upon for the Allowance of the Writ" (Petition, Pg. 4) deal solely with the charge of unseaworthiness. The City of Galves-

ton is not involved on these points. The City owned and operated the grain elevator; it had nothing to do with the ownership and operation of the ship.

As to the claims of the Petitioners in the Trial Court as set forth on Pgs. 6-7 of the Petition, Petitioners alleged that we (the City) fumigated the grain while it was in the elevator. The Trial Court found that we did not (Findings of Fact No. 5- Tr. Pg. 82; No. 6, Tr. Pg. 84; No. 12, Tr. Pg. 87). This finding of the Trial Court is not attacked here.

Petitioners also alleged in the Trial Court that by reason of prior incidents, we were put on notice to exercise a high degree of care. (See—Petition, Pg. 7). But these prior incidents involved findings, or allegations, to the effect that the City fumigated the grain (Finding No. 17—a finding not attacked here). Since the City did not fumigate the grain here, these prior incidents have no materiality, except to show that whereas before the City had fumigated the grain, it did not do so here and thus, in connection with the allegation of prior incidents, here had fully complied with all duties relative to such prior incidents by not doing at all the acts complained of there.

Petitioners third claim (see—Petition, Pg. 7) was that even though the City did not fumigate the grain, it should have had more inspection. The Trial Court found against this claim by Findings 7, 8, 12, 14, 15 and 16 (Tr. Pgs. 84-89).

Therefore, the Trial Court's findings on the facts

were against Petitioners on each theory asserted by them on trial. The Court of Appeals affirmed these findings in its original opinion. This Court in reversing as between the shipowner Cardigan and Petitioners did not mention us or upset these findings in any way.

We cannot accept Petitioners' statement of "The Undisputed Facts". (Petition, Pg. 9). We respectfully call attention to our Brief in the Court of Appeals, Pgs. 3-25, as correctly showing the facts proved on trial.

The argument from Pgs. 7-22 of the Petition relates to the "unseaworthy" controversy and does not involve u

With respect to the argument commencing on Pg. 23 of the Petition, insofar as they relate to us,—we answer:

(a) The prior incidents referred to involved fumigation by the City of the grain while it was in the City's elevator. Here the Trial Court found that the City did not fumigate the grain at all (Findings No. 5, Tr. Pg. 82; No. 6, Tr. Pgs. 84; and No. 12, Tr. Pg. 87) and that any fumigation was done at some inland point prior to the grain's coming into the possession or control of the City. (Finding No. 12, Tr. Pg. 87). No attack on these findings is made by the Petitioners here and in addition, the evidence to demonstrate the correctness of these findings (and the Court of Appeals' affirmance of them) may be found on Pgs. 3-16 of our Brief in the Court of Appeals. We refer to our

Brief there for reference on these fact questions because otherwise we would have to simply repeat the same summary here.

(b) The City did not know and in the exercise of reasonable care should not have known that the grain which went aboard the "GRELMARION" had been improperly treated with an excessive amount of fumigants in an inland elevator prior to coming into the possession or control of the City. (Findings 7, 8, 12, 14, 15 and 16, Tr. Pgs. 84-89). No attack on these findings is made here and in addition, they are fully sustained by the evidence as shown on Pgs. 16-19 of our Brief in the Court of Appeals.

(c) In addition, actually the City did inspect the grain in a reasonable manner. (Findings 7, 8, 15 and 16) - see Pgs. 19-23 - our Brief in the Court of Appeals. Petitioners make no reference to these findings in their Petition here.

(d) Also, any additional tests would have been unavailing. (Finding 16) - see Pgs. 23-25 - our Brief in the Court of Appeals. Again Petitioners make no reference to this finding in their Petition here.

Petitioners' argument on Pgs. 23-29 of the Petition (which is the only portion of the Petition even claiming liability against the City) is practically a verbatim lifting of the same argument out of the Petitioners' Brief in the Court of Appeals (and repeated at Pgs. 20-29 in their former Petition for Certiorari). These arguments are on the fact questions

and a full reply would involve a complete requoting of Pgs. 3 to 36 of our Brief in the Court of Appeals. Additional copies of this Brief were furnished to the Clerk of this Court on the former petition and we respectfully request this Court to consider and refer to our Brief in the Court of Appeals for a full reply on these fact questions.

The only other point made in the Petition, as involves us, is the alleged inadequacy of damages (Pgs. 29-35). This argument is substantially the same as previously made in the Court of Appeals and our reply is found on Pgs. 36-44 of our Brief in the same Court.

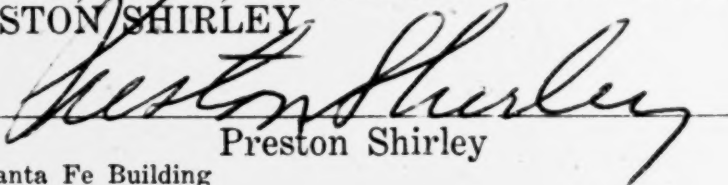
### CONCLUSION

The Respondent City of Galveston therefore respectfully prays that certiorari be denied and in the alternative that any grant of certiorari be limited to the controversy between Petitioners and the Respondent Cardigan Shipping Company, Ltd.

Respectfully submitted,

McLEOD, MILLS, SHIRLEY & ALEXANDER  
PRESTON/SHIRLEY

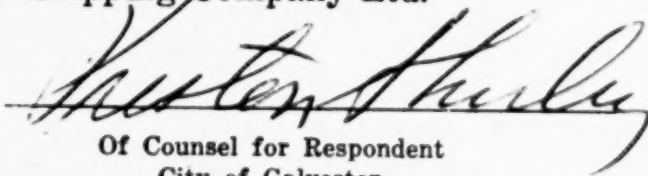
By

  
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ATTORNEYS FOR THE RESPONDENT,  
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I certify that a copy of the foregoing Respondent City of Galveston's Reply to Petition for Writ of Certiorari has been mailed on the 27 day of July, 1961, to Mr. Arthur J. Mandell, Mandell & Wright, Seventh Floor, South Coast Building, Houston 2, Texas, attorney for Petitioners, and to Mr. Edward W. Watson, Eastham, Watson, Dale & Forney, United States National Bank Building, Galveston, Texas, attorney for Respondent, Cardigan Shipping Company Ltd.

  
Of Counsel for Respondent  
City of Galveston

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IN THE  
**Supreme Court of the United States**

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October Term, 1961

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No. ~~291 M~~

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ROBERT MORALES, ET AL., *Petitioners*

v.

CITY OF GALVESTON AND CARDIGAN  
SHIPPING COMPANY, LTD., *Respondents*

---

**RESPONDENT CARDIGAN SHIPPING COM-  
PANY'S REPLY TO THE PETITION FOR  
WRIT OF CERTIORARI**

---

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**RESPONDENT CARDIGAN SHIPPING COM-  
PANY'S REPLY TO THE PETITION FOR  
WRIT OF CERTIORARI**

---

*To The Honorable The Chief Justice And The Associate  
Justices Of The Supreme Court Of The United States:*

The Respondent Cardigan Shipping Company, Ltd.,  
respectfully prays that this Petition for Certiorari be in  
all things denied.

## A.

**The Opinions Below**

The Findings of Fact and Conclusions of Law by the Trial Judge, sitting in Admiralty, are reported at 181 F. Supp. 191. (In copying these Findings of Fact as Appendix "E" of the Petition for Certiorari, and in the references thereto in the Petition, all Findings of Fact after "12" appear to have been numbered one more than in the official report). The Court of Appeals for the Fifth Circuit first affirmed in an opinion reported at 275 F. 2d 191 and dated February 22, 1960. Rehearing was denied April 8, 1960. On a first Petition for Certiorari this Court on October 17, 1960 entered a Per Curiam order reading "The Judgment of the Court of Appeals is vacated and the case is remanded to that Court for consideration in light of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539". After having received supplemental briefs from the parties, and this reconsideration, the Court of Appeals for the Fifth Circuit rendered a second opinion, on May 17, 1961, which again affirmed the decree of the Trial Court denying a recovery to the Petitioners. (This latter opinion, not yet officially reported, appears as Appendix "F" to the present Petition for Certiorari).

## B.

**The Questions Presented**

While the statement of the questions in the Petition for Certiorari, and the argument of that Petition, again raises issues of negligence, notice as an element of unseaworthiness, and the factual support for the findings made by the Trial Court, the single question now presented would

appear to be whether, under the facts as found by the Trial Court and which the Court of Appeals has found were not erroneous, this respondent caused injury to the petitioners by failing to provide a ship and appurtenances reasonably fit for their intended use. In the second consideration of this case by the Court of Appeals the majority of that Court makes it clear that their earlier affirmation of the Trial Court had not been rested upon a doctrine of "temporary unseaworthiness" or the absence of some notice to the shipowner, and that the shipowner's satisfaction of the obligation to provide a seaworthy ship, as now delineated in *Mitchell*, has been re-affirmed under the particular facts of this case.

### C.

#### Statement of the Case

In view of the contentions of the Petition special attention is directed to these facts, found by the Trial Court and supported by a clear preponderance of the evidence:

(1) The cargo bin on respondent's ship, the GREL-MARION, in which Petitioners were trimming grain, was of customary design, was clean, and was in all respects ready and fit to receive grain as it came from the elevator spouts.

(2) The absence of a forced ventilation system for this cargo bin did not affect its suitability for the purpose intended. Not only did no witness actually testify to the use or need for such a system (cf R. 63, 107-108, 197, 215, 294) but it was also obvious from the petitioners' own description of their work that any blown air would have created an intolerable condition on account of grain dust. The references by the Petition for Certiorari (p.

28) to Coast Guard "advice" for the purpose of preventing asphyxiation, and the pictures reproduced as Appendix "G" to that Petition, relate *only* to precautions which are to be taken when fumigation has been carried out aboard a vessel. The GRELMARION had not been fumigated (Finding of Fact 17) and the references now offered by the Petition under this point were irrelevant to the case before the Trial Court and were not even tendered in evidence there. As found by the Trial Court (Findings of Fact 9, 10, and 11) and even more fully demonstrated in the Petitioners' own testimony the cause of any injury was not in the shortage of oxygen in their working space, notwithstanding that the entrance was covered by the "run" of grain, but was solely the contact with fumes coming directly off the grain from the elevator spout. (R. 45-47, 126, 147, 241, 280). The grain was still running from the spout as, smarting eyes and other symptoms showed the presence of an alien substance on the grain. (R. 47, 78, 128-129, 147, 241, 284, 434, 553). That the hatch opening was temporarily covered by the running grain was not only not unusual, it was customary and normal. (R. 56, 67, 121, 189-190, 243-244).

#### D.

#### Argument

In its second opinion the Court of Appeals has made it clear that neither in that Court nor in the District Court were any facts found which made the GRELMARION unseaworthy even temporarily. The Petitioners' argument assumes the premise that, since *Mitchell*, not only may the liability for unseaworthiness arise from a transitory and instantaneous condition but that the liability necessarily

follows whenever an injury does occur since there was no longer a place to "work in with safety".

The error in the Petitioners' view of the evidence in this case has been pointed out by Judge Hutcheson in these words:

" . . . the cause of the injury was not any defect in the ship but the fact that the last shot of grain which was being loaded was contaminated as the result of dangerous chemicals, harmful to human beings, having been used for the purpose of killing weevils. It is, in our opinion, a correct analysis of the situation to say that this is not, as the Mitchell case was, a case of a vessel being temporarily unseaworthy."

(May 17, 1961 opinion).

Respondent respectfully suggests that the dissenting opinion by Judge Rives exhibits the same misapprehension of the evidence in the *Morales* case, if not of the rule of the *Mitchell* case, as is shown by the Petition. After quoting (in part) Finding of Fact 9 (181 F. Supp. 202) Judge Rives states "It is clear that temporarily the bin where the libellants were working was not a reasonably safe place in which to work". But if one reads not only Finding 9, but also 10, 11, 12, 13, 14, and 15 (Tr. pp. 84-89), or, even better, the Record which describes the whole matter in greater detail, it is patent that any injury to the Petitioners was solely and proximately caused by a direct contact with chloropicrin fumes which came from the grain as the elevator spout deposited that grain in the bin where Petitioners were working.

While the Petitioner, and Judge Rives, would equate the *Morales* case with *Mitchell* it might be more logical to say that Mitchell would be like Morales if the fisherman Mit-

chell had been stabbed in the hand by the spine of an unusual species of fish as he was working the nets of the Trawler Racer to bring aboard the usual catch.

"Appellant seems to think that all the seamen must establish to warrant a recovery in this case is that there was grease on the gangway and that he slipped on the grease and was injured. In effect he says: grease is slippery, and, if grease was on the gangway and appellant slipped on it, he is ipso facto entitled to recover, as the vessel must have been unseaworthy. But the teaching of Mitchell is merely that there must be and is a 'complete divorcement of unseaworthiness liability from concepts of negligence,' and that the duty of the shipowner is not 'to furnish an accident-free ship' but 'only to furnish a vessel and appurtenances reasonably fit for their intended use'." . . .

—*Blier v. United States Lines Co.*  
2nd Cir., Feb. 1961, 286 F. 2d 920

The premise that while a place may be unsafe in which to work, as evidenced by the injury, this does not necessarily constitute unseaworthiness, is stated in a number of cases post-Mitchell.

*Caraballese v. Nav. Aznar*, 2nd Cir., Nov. 1960, 285 F. 2d 355, Cert. Den. 365 U.S. 872; 5 L. ed. 2d 862;

*Arena v. Luckenbach S.S. Co.*, 1st Cir., on rehearing June, 1960, 279 F. 2d 186, at 189, Cert. den. 364 U.S. 895, 5 L. ed. 2d 189;

*Billeci v. United States*, N.D. Cal., July 1960, 185 F. Supp. 711;

*Green v. Skibs A/S MANDEVILLE*, E.D. Car., Aug.-Oct. 1960, 186 F. Supp. 459, 188 F. Supp. 65;

*Knox v. United States Lines*, E.D. Penna., Aug. 1960, 186 F. Supp. 668.

While the Trial Court found the respondent ship-owner and the co-respondent wharves operator not liable to these Petitioners for their injuries either on the ground of unseaworthiness or negligence, having heard all of the evidence on the issue of damages the Trial Court followed the commended practice of finding the amount of the damage sustained by each libellant. The Petition for Certiorari has attacked those findings as being inadequate as a matter of law. The basis for this attack is primarily a comparison of the damages as determined by the Court with the medical expense paid for and compensation paid to these longshoremen under the Longshoremen's and Harborworkers' Act. While submitting that the question as to the amount of damages should remain academic respondent also contends that voluntary payments under the Act, in a proceeding to which respondent was not a party, had no substantial weight as evidence. The Trial Court heard and also considered testimony on this issue which showed that the effects of this incident were discomforting more than painful, that no one had to be hospitalized, that no permanent consequence attached, and that even where the medical treatment was extended it served primarily to relieve the minds of the complainant. While emphasis is given by the Petitioners to the reduced earnings from their employment only on banana boats after the GRELMARION matter the Trial Court heard also, as the Record shows, that the primary employment of these men was as workers on banana boats and that their employment as "extra hands" for grain-trimming was not a constant source of their income. The Record also discloses that within a day or two after the GRELMARION matter these men were able to return to their employment on banana boats, notwithstanding their alleged disabilities.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 480

ROBERT MORALES, *et al.*,

*Petitioners,*

—vs.—

CITY OF GALVESTON, *et al.*,

*Respondents.*

BRIEF ON THE MERITS

FOR PETITIONERS, ROBERT MORALES, MIGUEL  
MEJIA, APOLONIO OVALLE, NICK DE LEON,  
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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1961**

**No. 480**

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**ROBERT MORALES, et al.,**

*Petitioners,*

**—vs.—**

**CITY OF GALVESTON, et al.,**

*Respondents.*

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE  
FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA

---

**BRIEF ON THE MERITS**  
**FOR PETITIONERS, ROBERT MORALES, MIGUEL**  
**MEJIA, APOLONIO OVALLE, NICK DE LEON,**  
**FIDENCIO BALLI, MICHAEL SERRATO,**  
**AND JUAN ARRENDONDO**

---

**I.**

**Former Opinion of This Court**

The opinion of the United States Supreme Court, granting Petitioners certiorari vacating the judgment of the Court of Appeals dated October 17, 1960 is reported in 364 U.S. 295.

## **II.**

### **Opinions Below**

Opinion of the District Judge is reported at 181 F. Supp. 191; opinion of the Court of Appeals for the Fifth Circuit is dated May 17, 1961, 291 F. (2d) 97, reaffirming its own opinion and judgment reported at 272 F. (2d) 191, and reaffirming the District Court's judgment denying recovery to longshoremen for injuries sustained in the course of their employment while loading a vessel when the last batch of wheat loaded in the hatch where Petitioners were working was contaminated with poisonous gases rendering unfit quarters, i.e., hatch not reasonably fit to do the work with reasonable safety even though until that batch of grain was introduced the hatch was seaworthy.

## **III.**

### **Jurisdiction**

Judgment of the United States Court of Appeals for the Fifth Circuit here sought to be reviewed was entered on the 17th day of May, 1961.

The jurisdiction of this Court to review by Writ of Certiorari the judgment complained of is conferred by Title 28, U.S.C.A., Sec. 1254(1) and 2101(c). The opinion of the Court of Appeals for the Fifth Circuit reaffirms its former opinion and judgment entered on the 22nd day of February, 1960.

## **IV.**

### **Questions Presented for Review**

1. Can a hatch in a vessel, staunch and fit for the service intended of receiving grain, become unseaworthy, i.e., not

reasonably fit to do the required work with reasonable safety by the introduction of contaminated grain, even though the owner had not expected that contaminated grain would be loaded into the hatch.

2. Is notice, actual or constructive, that contaminated grain was introduced into the hatch where longshoremen were working rendering said hatch not reasonably fit to trim the grain with safety, i.e., unseaworthy, caused by the introduction of a batch of grain which contained poisonous gases producing personal injuries to longshoremen working in the hatch for the purpose of trimming such grain,<sup>1</sup> an essential element of recovery.

3. Is notice, actual or constructive, of the sudden and unexpected presence of noxious and injurious fumes from a batch of grain poured into the hatch where longshoremen were working for the purpose of trimming it in the hatch, an essential element of recovery under the doctrine of unseaworthiness.<sup>2</sup>

4. Whether the Trial Court's Findings of Fact Nos. 9, 10, 11 and a portion of 19 establish unseaworthiness as a matter of law.

5. In view of the Trial Court's Findings of Fact Nos. 9, 10, 11 and a portion of 19 which establish unseaworthiness was the Appellate Court in error in affirming and reaffirming the Trial Court's conclusion that the hatch was not unseaworthy.

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<sup>1</sup> See Trial Court's Findings of Facts Nos. 9, 10, 11 and a portion of 19, T.R. pp. 85, 86 and 92.

<sup>2</sup> See Trial Court's Findings of Facts Nos. 9, 10, 11 and a portion of 19, T.R. pp. 85, 86 and 92.

6. Whether a Trial Court's conclusion "that the vessel was not unseaworthy" be deemed "a Finding of Fact" subject to the clearly erroneous rule in the face of the Trial Court's specific findings 3, 9 and 11, which spell out unseaworthiness as a matter of law.

7. In view of the knowledge of the City of Galveston and the Cardigan Steamship Company through its agent Texas Transport and Terminal Company of at least four prior incidents in which a substantial number of longshoremen were injured while trimming grain loaded by Respondent City of Galveston, under exactly the same circumstances, was the failure of Respondent steamship company and the City of Galveston to test the grain as it leaves the last bin of the City's warehouse and before it is channeled into the spout while loading aboard the vessel negligence.

8. Whether the damages found by the Trial Court were inadequate as a matter of law.

### **Brief Statement of the Case**

This case involves a libel filed by eight longshoremen employed by Texports Stevedoring Company, a subsidiary of Texas Transport & Terminal Company, Cardigan's Agent, to recover damages for personal injuries sustained by them on the 14th day of March, 1957, while they were working in the hold of the SS GRELMARION.

1. As to the Respondent, Cardigan, it was contended that the vessel was not seaworthy in that:

- (a) As a quantity of grain containing the poisonous and dangerous fumigant entered the hold, it became dangerous and unsafe place for Petitioners, and therefore the shipowner breached its non-delegable duty to supply Petitioners with a reasonably safe place in which to work;

- (b) That the hatch became unseaworthy, i.e. not reasonably fit to do the work with safety;
- (c) That Respondent Cardigan as owners and operator of the SS GRELMARION was negligent in that tests and other precautions against the happening of such incident have not been taken at the last bin in the warehouse before it began its journey into the spout and thence into the hold of the vessel;
- (d) That Respondent Cardigan through its agent, Texas Transport & Terminal Company having had full knowledge of at least four prior incidents in which longshoremen doing the same work on vessels moored at the Galveston docks were injured and were paid damages by reason of being overcome by gaseous fumes from treated grain while trimming it (as here) were charged with knowledge of the dangerous condition that would most likely arise, and failed to take measures to discharge its non-delegable duty to petitioners to provide a safe place in which to work, i.e. provide blowers to force air into the hatch where Petitioners were required to work.

2. As to the City of Galveston Petitioners claimed that the City was negligent in:

- (a) Fumigating the wheat in question for the purpose of killing weevils and that the fumigant used was a strong and dangerous chemical harmful to human beings when exposed to its fumes;
- (b) That, by reason of prior incidents of similar nature the City had knowledge of the danger and the probability of harm, and should have exercised a high degree of care or alternatively ordinary care

in fumigating the wheat in such a manner that persons such as longshoremen while working with it would not be injured by the poisonous fumes;

- (c) That if the fumigants were not applied by the City in its elevators or railroad cars at the dock near the elevator, but inland and before the grain reached the City elevators, the City having knowledge of such practice should have made proper inspection of the grain in order to determine the presence of such fumes and gases, so that, when placed in the hatch of a vessel, without any air or ventilators, persons working therein would not be injured.

### **Trial Court's Pertinent Findings as to Unseaworthiness**

The Trial Court's Findings of Facts Nos. 9, 10 and 11, T.R. p. 85, and the Court of Appeals in both of its opinions confirmed these findings that on March 14, shortly after 1:00 o'clock, when these Petitioners returned to work, the bin in No. 2 hatch was practically full and another "shot" of grain of approximately five hundred (500) or so bushels were poured into the hatch which covered the entire opening of the hatch, the flood of grain closing the hatch and shutting out the air completely leaving these longshoremen trapped without air and exposed to the poisonous gases and fumes which injured them as follows:

"9. The GRELMARION began loading the morning of March 13, 1957, and continued without incident throughout that day and the following morning, until interrupted for the lunch hour on March 14. When the longshoremen returned to work in the offshore bin of the No. 2 hold at about 1 p.m., on March 14, 1957, the bin was approximately three-fourths full, the grain

then extending to within some four or five feet of the top of the bin. A last 'shot' of grain was called for, and was released into the bin. *This quantity of grain completely covered the hatch opening* (which was the only means of entrance and exit for the longshoremen, *and was the only source of ventilation*); the longshoremen were working for the moment in an area, *completely enclosed and without access to outside air*. This in itself was not an unusual incident. (Emphasis ours)

10. Almost immediately the longshoremen felt ill effects. This was manifested by a burning and stinging sensation in the nose and throat, watering of the eyes, and a choking sensation. A certain amount of hysteria developed. The attention of those on deck was attracted, and the spout was shut off. The men dug a passageway through the grain and climbed and were assisted to the deck and the open air. Some experienced nausea and dizziness.

11. I find as a fact that certain noxious fumes and gases were introduced into the bin with the last 'shot' of grain which was loaded after 1 p.m., and that such fumes resulted from an insecticide applied at some point to destroy weevil infestation. I further find that the condition and complaints of the Petitioners were not—as the Respondent City contends—attributable solely to a temporary oxygen deficiency in the bin, coupled with hysteria.

19. The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. • • • "

It is respectfully submitted that these Findings constitute findings of unseaworthiness. The Court in effect states that the hatch in which Petitioners were working was safe in all respects until the last "shot" of grain which was contaminated, rendered the place, i.e., the hatch, not reasonably fit to do the work with safety. The Trial Court's conclusion on the last part of Finding of Fact No. 19, that "Under these circumstances I find that the admission thereof into the bin of the vessel *did not cause the GRELMARION to become unseaworthy, the vessel and all its appurtenances being entirely adequate and suitable in every respect,*" is directly contrary to the decision by this Court in the *Mitchell* case, *supra*. (Emphasis ours.)

### **The Undisputed Facts**

The loading began on March 13, 1957, while the SS GRELMARION, owned by the Respondent Cardigan Steamship Company, was berthed in Galveston, Texas, at a wharf adjacent to elevator "B" engaged in the loading of wheat from the elevator.

Elevator "B" is owned and operated by the City of Galveston, commonly referred to as "Galveston Wharves" for the purpose of storage and shipment overseas by vessel (R. p. 577). A small amount of grain is received by truck and barge (R. p. 595).

On the arrival of a car, the Galveston Cotton Exchange Board of Trade, grain department samplers go into the line haul railroad yards, break the seal on the car, open it and take samples from each car. The samples are then brought to such organization's laboratory (R. p. 596). The sampling, however, is for the grade of the grain and is not sampled for any fumigants (R. p. 598). The City then using its own shovels unloads the grain into a pit underneath

the car and thence by a system of rubber conveying belt with approximately 1,000 buckets on it picks the grain out of the pit (R. p. 604) and on to the elevator where it is weighed, then through chutes into storage bins (R. pp. 606-611).

When it comes to getting the grain out of the elevator, a mixture is usually made of various grades, which when taken together in certain proportions will come out as the grade ordered by the owner or shipper (R. p. 616). In order to get the type of grain ordered, it is invariably necessary to mix the grain from the numerous bins in the elevator. The grain leaves the several bins by way of an open conveyor belt until it comes to a common point (R. p. 619). The grain then goes on a joint belt up to scales where it is weighed, thence on to a belt that delivers it from the workhouse to the wharf (R. p. 620). Upon reaching the wharf, it goes into a shipping bin which is above the shipping gallery and immediately above the ship to be loaded (R. p. 620). The stevedores then place the dock spout in position so that the grain will be loaded into the desired hatch on the vessel. The stevedores then telephone to the elevator telling them to start releasing the grain (R. p. 621). See detailed testing of Carroll (R. pp. 593-623) particularly (R. p. 608):

*"Mr. Carroll: In other words, we have a co-mingled house, all classes and grades are binned co-jointly . . ."* (Emphasis ours.)

The loading of the GRELMARION began on March 13, 1957, and continued the following morning until noon, which proceeded without any untoward event. Shortly after 1:00 o'clock, when these Petitioners returned to work in the bin in No. 2 Hatch, the bin was practically full and another shot of grain of approximately five hundred (500) or so

bushels was put into the hatch which covered its entire opening. This trapped Petitioners and they immediately felt ill from the effects of the chemicals with which the grain was treated. They, and some other workmen from on top of the deck, dug a passageway through the grain and climbed out and were assisted to the deck, in the open air. All experienced nausea and dizziness and were treated by physicians for some periods of time thereafter.

It is undisputed that no test of the grain was made for the purpose of determining whether it was contaminated with poisonous or gaseous fumes from fumigant with which the grain was treated either while it was in the City's elevator, the railroad cars before it was placed into the City's elevator, or at an inland point from whence it was shipped. Similar incidents occurred before, resulting in injury to longshoremen trimming grain in vessels being loaded with grain from elevators owned and operated by Respondent City of Galveston. These previous incidents were known to both the City of Galveston, as well as Texas Transport and Terminal Company, Cardigan Shipping Company, Ltd.'s Agent. Trial Court's Findings of Fact, Nos. 17 (a)-(b)-(c)-(d), T.R. pp. 89-90-91-92 reads as follows:

"I find—as Libellants contend—that several incidents not unlike that giving rise to the present action have occurred in Galveston, and I further find that all parties hereto, namely, the Libellants, some of whom were therein involved, the vessel (through her Galveston agents), and the City, all had actual knowledge thereof. These are as follows:

(a) In 1949, while the LIPSCOMB LYKES was loading grain at Galveston, a similar incident occurred in which some 140 longshoremen working in various holds of the vessel were sickened and made ill by fumes from grain being loaded. Judge T. M. Kennerly, of this

Court, found as a fact that the City had fumigated the grain in question; that it had done so negligently by using excessive quantities of fumigant, and by failing properly to aerate the grain. By reason thereof, liability was imposed on the City (Ad. No. 1909, S.D. of Tex., Galveston Div., July 16, 1952; Aff'd, City of Galveston v. Miranda, 205 F. 2d, 468 (5th Cir.)).

(b) In 1950, a number of longshoremen were similarly affected while loading grain aboard the PANAMOLGA in Galveston. Only the vessel and her owner were libeled, and the City, as operator of the elevator, was not a party to that proceeding. Judge Thomsen, of the U.S. District Court for the District of Maryland, absolved the vessel and her owners of blame, and found the PANAMOLGA seaworthy. The Court was of the view (in the absence of the City) that the fumigant had been applied in and by the elevator, and found as a fact that whatever fault there was, was that of the City, in that the City had agreed to notify the ship's agent when grain recently fumigated was about to be loaded, and that no such notice was given to the agents of the PANAMOLGA in that case. (McMahon v. The Panamolga, 127 F. Supp. 659.)

(c) In 1953, the ZOSIANNE, while loading grain at Galveston experienced a somewhat similar incident. An action was filed in this Court by a number of longshoremen to recover for alleged injuries from having breathed noxious fumes (Ad. 1937, Galveston Div.), charging that fumigants were applied by the City to grain in the elevator. This action was settled, and was never tried.

(d) There is some mention in the evidence of a comparable incident on the MORMACMOON in 1950. The

evidence as to what transpired in that instance is not clear, only that a comparable claim was made."

Notwithstanding such findings, the Trial Court, 181 F. Supp. 191, affirmed on appeal, 275 F. (2d) 191, 195, holding Cardigan Steamship Company, Ltd., not liable, saying in effect that the situation was caused by an "unexpected", "transitory" condition of which the shipowner had no notice. On remand from this Court the Court of Appeals reaffirmed its former decision again on the unexpected, i.e., transitory doctrine theory because the shipowner had no notice and did not *expect* that grain so contaminated would be loaded into the bins. 291 F. (2d) 97. The Court holding that the ship was at all times seaworthy and fit for its service of receiving *uncontaminated* grain. We respectfully submit that there is no distinction between the facts as found by the Trial Court confirmed on appeal and the facts in the *Mitchell* case. If there be a distinction, it is a distinction without a difference.

The Court did not make any Findings of Fact of the failure of the Cardigan Steamship Company, Ltd. to use blowers to force air into the hatch so that in the event the hatch bin would be closed by the flood of grain, contaminated or otherwise, and cut off all air, there would still be air forced into it.

In view of Findings 9, 10, 11 and 19, the Trial Court, obviously mindful of the confusion and conflict created by the *Cookingham*, *Adamowski*, *Petterson* and *Poignant* cases, made findings as to damages (which we submit as shown under proper assignment, are wholly inadequate, apparently uncertain how or when the confusion would be cleared or the conflict resolved).

### **Proposition Number One**

A hatch in a vessel, staunch and fit for the service intended of receiving grain becomes unseaworthy, i.e. not reasonably fit to do the required work with reasonable safety by the introduction of contaminated grain, even though the owner had not expected that contaminated grain, producing personal injuries to longshoremen working in the hatch for the purpose of trimming such grain, even though the owner had no knowledge that contaminated grain would be loaded into the hatch.

### **Proposition Number Two**

The Trial Court's Findings of Fact Numbers Nine, Ten, Eleven and a portion of Nineteen establish unseaworthiness as a matter of law, see Appendix A.

### **Proposition Number Three**

The Trial Court's Specific Findings of Fact, Numbers Nine, Ten and Eleven do not support the Trial Court's conclusion that "the vessel was not unseaworthy" but is directly contrary to such Findings of Fact.

### **Argument and Authorities**

In view of the inter-related questions, presented in Propositions Numbers One, Two and Three, we believe we can best aid the Court by presenting them together.

This Court's opinion in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, is clear authority to support Petitioners' contention that the Trial Court's Findings of Facts Nos. 9, 10, 11 and a portion of 19 establish unseaworthiness causing Petitioners' injuries and are therefore entitled to recovery.

As so ably stated by Judge Rives in his dissent, there is no real distinction between *Mitchell* and this case. The Court of Appeals in its original opinion, 275 F. (2d) 191, attempted to distinguish the facts in this case from the First Circuit's decision in the *Mitchell* case, 265 F. (2d) 426, as follows (page 99, 291 F. (2d)):

“ \* \* \* This is not a case of something transitory occurring to prevent the ship from being reasonably fit to permit a libellant to perform his task aboard the ship with reasonable safety and, *persisting* without being discovered, causing injury such as is dealt with in the *Mitchell* case, *supra*, and the other cases cited by appellants. This is a case of a happening ‘when the last batch of wheat came out of the funnels’, *instantaneously* rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be, entirely seaworthy.”

Obviously this Court was not persuaded by the distinction made by the Court of Appeals of the *Mitchell* case and the case at bar and in view of this Court's decision in *Mitchell*, obviously the distinction is not sound.

Justice Harlan when sitting on the Court of Appeals for the 2nd Circuit dealt with a similar situation in *Dixon v. United States*, 219 F. (2d) 10, p. 14, he cites *Hawn v. Pope & Talbot, Inc.*, 3rd Cir., 1952, 198 F. (2d) 800, affirmed, 1953, 346 U.S. 406, 74 S.Ct. 202 stating:

“unsatisfactory working conditions held to be within the seaworthiness doctrine, although the vessel itself and her appliances were seaworthy.”

Thus in *Valerio, et al. v. American President Lines, Limited, et al.*, 112 F. Supp. 202, District Judge Bondy, an experienced Admiralty Judge, held that the hatch in which

drums of cashew nut oil were stowed (like the case at bar) and all the vessel were in all respects seaworthy and reasonably fit to receive and to hold the drums of cashew nut oil. The Court nevertheless held the shipowner liable because the drums were leaking and the cashew nut oil caused the longshoremen discharging the drums of oil to develop dermatitis. The shipowner settled with the longshoremen and filed its third party action against the stevedoring company. The District Judge in discussing the shipowner's liability to the longshoremen stated as follows (p. 203):

"Respondent's liability to libellants Kulakowski, Liquori and Cupo, who handled the drums or equipment on the ship, can not be questioned. In *Anderson v. Lorentzen*, 2 Cir., 1947, 160 F. 2d 173, which likewise involved cashew oil, it was held that the owner of the ship was under a duty not only to provide libellants with a seaworthy ship upon which to work, but also to provide them as business invitees with a reasonably safe place to work and to warn them of the dangers of handling cashew nut shell liquid. This duty of the shipowner was held to be nondelegable and the shipowner was held liable to the longshoremen notwithstanding any concurrent duty on the part of a stevedoring company."

Following the *Valerio* case, this Court decided the *Mitchell* case eliminating the requirement of notice or prior knowledge of the condition. In so doing Justice Stewart quotes with approval from the *H. A. Scandrett* case, C.A. 2nd Cir. 87 F. 2d 708, as follows:

"In our opinion the libellant had a right of indemnity for injuries arising from an unseaworthy ship even though there was no *means of anticipating trouble*." (Emphasis ours.)

In the case at bar the District Court quoted with approval by the Appellate Court, found:

"This is a case of a happening 'when the last batch of wheat came out of the funnels' instantaneously rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be entirely seaworthy."

Judge Hoffman quotes with approval from the Law of Maritime Personal Injuries by Norris, Sec. 36, page 85:

"For the 'instantaneous act' makes the vessel just as unseaworthy to the injured person, as it would if the defective condition was put into motion a minute or an hour before the time of injury."

See *Holley, Admnx. v. The Manfred Stansfield*, 1960 A.M.C. 1956, 186 F. Supp. 212.

See also *McFall v. Compagnie Maritime Belge, et al.*, 1952 AMC 1860. In the *McFall* case longshoremen were injured by fumes leaking from steel drums of carbon tetrachloride they were unloading. Recovery was allowed.

Since the *Mitchell* case, in which sudden and unexpected situations, created without fault of the shipowner, rendering the area in which the longshoremen were working not reasonably fit to do work with safety have been declared to be an unseaworthy condition and if such condition caused injury recovery was allowed. *Grzybowski v. Arrow Barge Co., Inc.*, 283 F. (2d) 481, C.A. 4th Cir. In that case a longshoreman received an injury because a slippery, dangerous and hazardous condition was created by the use of soap which was supplied by the stevedoring company and Plaintiff was injured because he slipped on the soap. The Court in charging the jury stated that in order to maintain a seaworthy ship "the owner is not required to keep the

appliances or work spaces which are inherently sound and seaworthy absolutely free at all times from transitory, occasional or immediate unsafe conditions resulting from their use; \* \* \*." The jury found for the Defendant. The Court of Appeals for the 4th Circuit reversed, stating:

"It is now well settled that a shipowner's obligation to maintain a seaworthy vessel, traditionally owed by shipowners to seamen, extends to a stevedore who is injured while aboard and loading the ship, although employed by an independent stevedoring contractor engaged by the owner to load the ship. For purposes of the liability for injury, a stevedore is a seaman because he is doing a seaman's work, incurring seamen's hazards, and is entitled to a seaman's traditional protection. Thus the shipowner's warranty of seaworthiness extended to the benefit and protection of Grzybowski as fully and completely as though he had been a member of the ship's crew.

Furthermore, a shipowner is not relieved of his responsibility and obligation even though the appliances, appurtenances and equipment used in the work are furnished by the stevedores themselves.

Here the pine jelly soap, the use of which is asserted by the plaintiff to have created an unseaworthy condition which caused his injury, was furnished by Nacirema from its gear shop. \* \* \*

Certainly in the *Grzybowski* case the vessel was at all times staunch and fit for the service intended, i.e., receiving the cargo which was to be loaded. Like the case at bar there was nothing wrong with the hatch within which the cargo was to be loaded but nevertheless the Court held, and properly so, that if the introducing into the hatch of a dangerous condition which made the place not reasonably fit to do the work required of the longshoremen with safety

an unseaworthy condition was created for which the shipowner is liable.

The Court of Appeals in its opinion of May 17, takes the same position as it did in its previous opinion and places again emphasis on the absence of notice on the part of the shipowner as grounds for its affirmance of the Trial Court's judgment denying recovery simply because the shipowner did not *expect* nor did it intend to have contaminated grain placed in the hold. This gets back again to the doctrine of notice which this Court has time and again held was not a prerequisite to the imposition of liability once the unsafe condition producing injury had been established. In the case at bar the Court found the dangerous condition to have existed proximately causing Petitioners' injuries. It is respectfully submitted that the case at bar like the *Mitchell* and *Grzybowski* cases presents a single issue whether with respect to so-called "transitory" unseaworthiness the shipowner's liability was limited by concepts of common-law negligence.

This Court in *Mitchell*, after clearly setting out the "absolute" duty being a species of liability without fault and that "due diligence of the owner" does not relieve him from this obligation, citing 328 U.S. 104, 66 S.Ct. 822, states as follows:

"From that day to this, the decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care. \* \* \*

"There is no suggestion in any of the decisions that the duty is less onerous with respect to an unseaworthy condition arising after the vessel leaves her home port, or that the duty is any less with respect to an unsea-

worthy condition which may be only temporary. Of particular relevance here is *Alaska Steamship Co. v. Peterson*, *supra*. In that case the Court affirmed a judgment holding the shipowner liable for injuries caused by defective equipment temporarily brought on board by an independent contractor over which the owner had no control. That decision is thus specific authority for the proposition that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability. That decision also effectively disposes of the suggestion that liability for a *temporary* unseaworthy condition is different from the liability that attaches when the condition is *permanent*." (Emphasis ours.)

Thus in the *Grzybowski* case, *supra*, the Court of Appeals states:

"In summary, as we interpret the *Mitchell* decision, the Supreme Court held that the character of the duty to provide a seaworthy vessel is absolute; that what is evolved is a complete divorcement of unseaworthiness liability from concepts of negligence; that, in determining whether the ship there involved was unseaworthy by reason of the slippery condition of the rail, *it was immaterial how the slime got there, who put it there, how long it had been there or whether the shipowner knew it was there*; that if the ship was thus rendered unseaworthy and the plaintiff suffered injury because of the condition, the shipowner was liable."

There is no real difference between the *Mitchell* case and the *Grzybowski* case and the case at bar. In the *Mitchell* case the ship's rail was "staunch" and a "fit" rail until it was covered with "slime and fish gurry." In the case at bar the hatch of the vessel was staunch and fit until the contam-

inated grain was in it in such quantity that it closed all openings rendering unfit the area in which the longshoremen were working so that they could do the work with safety. Indeed, this is conceded by the Court of Appeals. The reason assigned by the Court of Appeals for not imposing liability is because the owners did not "expect" the contaminated grain to be loaded into the hatch. This theory introduces the doctrine of notice and concepts of negligence not applicable under the circumstances in this case. In *Puerto Seguro Cia. Naviera, S. A. v. Petros Pitsillos*, 279 F. (2d) 599, C.A. 4th Circuit, the Court stated:

(p. 600) "Since the argument before us the Supreme Court has reversed that decision in 362 U.S. 539, 549, 80 S.Ct. 926, 933, 4 L.Ed. 2d 941. This makes it unnecessary to inquire whether the condition found by the District Court was or was not transitory. The 'transitory unseaworthiness' doctrine has been laid to rest by the Supreme Court's square holding that 'the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability,' and that *Alaska Steamship Co. v. Petterson*, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798, 'effectively disposes of the suggestion that liability for a temporary unseaworthy condition is different from the liability that attaches when the condition is permanent.'

Affirmed."

*Ruth Holley, Administratrix of the Estate of Edward J. Holley, Deceased v. THE MANFRED STANSFIELD*, 186 F. Supp. 212.

Notwithstanding this Court's order vacating the judgment of the Court of Appeals, 275 F. (2d) 191, it, yet without quoting, that Court again relied on the following cases:

- Cookingham v. U.S.*, 184 F. (2d) 213;  
*Hanrahan v. Pacific Transport Co.*, 262 F. 951;  
 cert. denied 252 U.S. 579, 40 S. Ct. 345, 64 L.Ed.  
 726;  
*Adamowski v. Gulf Oil Corp.*, 93 F. Supp. 115,  
 affirmed 197 F. (2d) 523;  
*Daniels v. Pacific-Atlantic Steamship Co.*, 120 F.  
 Supp. 96;  
*Garrison v. United States*, 121 F. Supp. 617;  
*McMahan v. The PANAMOLGA*, 127 F. Supp. 659;

all dealing with the doctrine of "transitory unseaworthiness" in sustaining the Trial Court's denial of recovery in the case at bar (see Court of Appeals' decision, 275 F. (2d) p. 195), notwithstanding *Mitchell, supra, Petterson v. Alaska Steamship Company*, 205 F. (2d) 478 (9th Cir.), affirmed 347 U.S. 396, 74 S. Ct. 601, *Poignant v. United States*, 225 F. (2d) 295 (2nd Cir.), *Boudoin v. Lykes Bros. S.S. Co.*, 348 U.S. 336, 75 S. Ct. 382; *Grillea v. United States*, 232 F. (2d) 919, all called to the Court's attention. We submit that it cannot possibly be argued that the five hundred (500) bushels of grain treated with poisonous and noxious chemicals poured into the hatch completely closing it, shutting off all air, trapping these longshoremen in the hold filled with poisonous gases (see Findings of Facts No. 9, T.R. p. 85) did not render that portion of the vessel not reasonably suited for the purpose for which it was intended, among which is, longshoremen working in it. Neither can it be successfully argued that a hatch, filled with grain, in which a number of longshoremen are working, with very little area in which to work, find the only opening suddenly covered by grain containing noxious and poisonous gases and fumes as reasonably fit to work in with safety.

See Judge Skelly Wright's opinion in *Casbon v. Stockard Steamship Corp.*, 173 F. Supp. 845. He aptly expresses himself as follows:

"Despite much weeping and gnashing of teeth by interests adversely affected, the doctrine of liability without fault remains firmly embedded in the general maritime law . . .

"It would seem certain, at least as of now, that the warranty of seaworthiness applies to those shore workers who perform duties on board a vessel traditionally performed by seamen. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143; *Seas Shipping Co. v. Sieracki*, supra. To these workers is owed the non-delegable duty to provide a reasonably safe place to work, as well as reasonably safe appliances with which to perform the work. *Manich v. Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561. *This duty cannot be contracted away* by requiring the shoreside contractor to supply the men and the equipment, nor can it be avoided by abandoning part of the vessel to such contractors."

In *Grillea v. U. S.* (2nd Cir.), 232 F. (2d) 919, a longshoreman fell into the hold when the vessel became unseaworthy due to his own negligence or the negligence of his companion, or both, in selecting the wrong hatch cover to place over the padeye. The Court stated:

" . . . It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct, in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the pre-

*scribed extent the owner is an insurer though he may have no means of learning of, or correcting the defect."*

"The Supreme Court recently reaffirmed the doctrine in *Alaska Shipping Company v. Petterson*, 347 U.S. 396; and we have since followed suit in *Poignant v. U.S.*, 225 F. (2d) —."

To the same effect *Pacific Far East Line v. Williams*, 234 F. (2d) 378; *Rodriguez v. The Texas Company*, 254 F. (2d) 295; *Sprague v. The Texas Company*, 250 F. (2d) 123; *Boudoin v. Lykes Bros. Steamship Co.*, 348 U.S. 336; 75 S. Ct. 382; *Johnson Line v. Maloney*, 243 F. (2d) 293 (9th Cir.).

Under the above authorities and especially under the *Mitchell* case, the Trial Court's Findings of Facts 9-10 and 11 and both opinions by the Court of Appeals in fact establish unseaworthiness. Thus we find the following statement by Judge Hutcheson:

"As we stated in our former opinion: 'This is a case of a happening "when the last batch of wheat came out of the funnels", instantaneously rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be, entirely seaworthy' for her intended service, the receipt of uncontaminated grain."

The Court of Appeals holds that because the hatch was rendered *instantaneously* unfit quarters causing injury to longshoremen liability would not impose. This is obviously contrary to this Court's decision in *Mitchell* and the cases hereinabove cited. One cannot accept the proposition simply because the dangerous or unfit condition lasted but a short time absolves the owner from the legal liability im-

posed by the doctrine of seaworthiness. Neither can one accept the proposition that notice is a necessary element in the so-called "transitory" unseaworthiness cases. All Courts have rejected the argument that every condition not directly connected with the physical structure of a vessel rendering the area not reasonably fit to do the work with safety does not impose liability. To do so would be to run contrary to the many prior decisions of this Court in unseaworthiness cases. To allow this decision to stand would reinstate the conflict and confusion generated by the *Cookingham* doctrine and weaken if not destroy what this Court has said many times that the shipowner has an "absolute and non-delegable" duty to provide and *maintain* a seaworthy ship. It is pertinent to define what the word "absolute" means. By definition of Webster's New International Unabridged Dictionary, 1955 edition, "absolute" is defined as " \* \* \* not relative \* \* \* ." If one relies upon this definition when this Honorable Court uses the word "absolute" in connection with the warranty of seaworthiness, there can be no qualification, limitation or restriction, and the transitory, unexpected or temporary unseaworthiness doctrine should have no acceptance or following in the courts. To stress the "transitory" or unexpected nature of the dangerous condition is to invoke concepts of negligence, which this Court rejected as unsound doctrine in the *Sieracki*, *Petterson*, *Boudoin* and *Mitchell* cases. In the long line of cases including *Sandanger*, *The OSCEOLA*, 189 U.S. 158, 173-175, 23 S. Ct. 483, *Sieracki*, *Petterson*, *Poignant*, *Mahnich*, *Boudoin*, *Williams*, *Grillea*, and others as relied upon by the Petitioners to sustain their position that even where the unseaworthy condition may be instantaneous or a temporary or transitory nature or appearing suddenly and unexpectedly, notice to the shipowner is not required to establish liability.

### **Proposition Number Four**

In view of the knowledge Respondents, City of Galveston and Cardigan Steamship Company, through its agent, Texas Transport & Terminal Company, have had of at least four prior similar incidents in which a substantial number of longshoremen were injured while trimming grain under exactly the same circumstances, Respondents' failure to test the grain as it left the last bin of the City's warehouse, and before it was channeled into the spout while loading the vessel, constitutes actionable negligence.

### **Argument and Authorities**

Since it is undisputed, and the Court found, that both the City of Galveston and Cardigan's Agent, Texas Transport & Terminal Company, knew of at least four prior occasions when longshoremen, like Petitioners, received injuries under similar circumstances the SS ~~DAPS~~COMB LYKES, where substantial sums of money have been paid by way of damages by the City of Galveston to one hundred fifty (150) longshoremen, The City, as well as Respondent's, Cardigan's, Agents, had notice that such conditions may very likely arise, yet, no precautions were taken by Cardigan or its Agents, and no tests conducted by either the City, or Cardigan, to determine the condition of the grain at the shipping bin above the shipping gallery and immediately above the ship to be loaded and before it was spouted into the hatch of the vessel. It is undisputed that neither the City nor the ship made any test to determine the chemical contents for fumigants put on the grain before it reached Galveston (R. pp. 381 through 391 witness Buest); the testimony of Traffic Manager for Texas Transport & Terminal Company, witness Gardner, Cardigan's Agent (R. pp. 585 through 590; General Manager of Galveston Wharves; wit-

ness W. H. Sandler). All the Respondent witnesses testified that no tests were made for the chemical content of the grain even though there was a good and convenient place at the last bin—i.e., the shipping bin—before the grain moved into the spout, to make such tests; that they knew that grain stored inland, before it is brought for storage, to the Galveston wharves is treated with fumigants (R. pp. 676 through 679—witness D. L. Carroll, General Foreman of the Galveston Wharves). This witness testified that no tests of the grain was made as it was loaded into the GRELMARION to determine whether it was safe for the men to trim that grain in the hatch of the vessel, even though this witness had knowledge (R. p. 679) of the incidents of the SS LIPSCOMB LYKES, MOORE-MACMOON, and ZOSIANNE.

Contrary to the Court's Finding No. 15, that no fumigants had been applied on this particular grain in the City's warehouse, the General Foreman of the Galveston Wharves, Mr. Carroll, and others, testified (R. 696 through 698 and R. 1047-1059) that certain grain fumigated in a certain bin of which a record is made is transferred to other bins but no record is kept of the grain so transferred, therefore, you often find fumigated grain in a bin of which there are no records of fumigation, in short, the record is only kept of *the bin* in which grain was fumigated but *not of the grain* (R. 697-698). Indeed, in response to questions put by the Court to the witness Mr. Carroll testified as follows:

"Q. (By the Court) The point I am making is, if you don't know about these possible transfers from bin 1 to bin 2, how can you tell me conclusively that the grain from bin 2 that went into the vessels had not been (R. 698) switched around, and hence perhaps *hadn't* been fumigated? Do you follow me?

The Witness Carroll: "I follow you. There is a slight possibility that a small amount of that could have happened, yes.

The Court: And your records would not show the contrary?

The Witness: No.

The Court: Or wouldn't show either way?

The Witness: It wouldn't show either way."

Neither could this witness testify how long the grain that was loaded in the GRELMARION was in the bin, whether it was there two days or three months (R. pp. 704-709 and 723). This witness, too, knew about the previous experiences at the Galveston Wharves when longshoremen were overcome by chemicals with which the grain was treated while doing the same work as Petitioners.

None of the Governmental Agencies made any tests for the presence of chemicals on the grains. Their tests were *not* for the purpose of determining the presence of chemicals with which the grain was treated but rather *its grade*. The test invariably was made either out in the open air with a small sample of grain or sometime after the grain was removed from the bin in an entirely different atmosphere than the closed, airless hatch (R. pp. 830-837, 840-842; R. pp. 968-972, 1002-1005) in which these Petitioners were trapped. It is obvious that none of the tests made either by members of the Board of Trade, Cotton Exchange, Agricultural Department, or by the employees of the Galveston Wharves were for the purpose of determining whether it was fumigated or the extent of its fumigation.

This is clearly illustrated by the testimony of Mr. Billy Ray Goss, who at the time of the occurrence was a grain sampler for the Cotton Exchange and Board of Trade, Grain Department, at the spout as the grain entered the

hatch (R. pp. 1017-1018). He testified that it was not his job nor did he test grain whether it was fumigated or to smell the grain or anything like it (R. p. 1027).

The testimony of Goss, and others, conclusively proved that none of the tests made either by the Board of Trade, Cotton Exchange or Agriculture Department, had anything to do with the existence or non-existence of fumigants (R. p. 1026). When questioned by the Court Mr. Goss, who was present at the spout when the men were buried underneath the 500 bushels of contaminated grain stated as follows:

“Q. Mr. Smelly, that is the gentleman, who testified before you?

A. Yes, sir.”

At that point the Court took over the examination of Mr. Goss, as follows:

“The Court: Was he (Smelly) there at the time that you are talking about, do you remember, Mr.—

The Witness: Well, I couldn't say whether he was exactly on the ship at that time, or not, but he could have been—this was on the forward end; he could have been on the back end, or something like that. Now, I couldn't definitely say that he was right there at that time, because I don't—I just don't remember.

The Court: But you do definitely recall the men coming out of the hold and making this complaint?

The Witness: Yes, sir, I recall men coming out of the hold—

The Court: You remember that, and you are not relying on some record or notation you made.

The Witness: No, sir, I am not relying on (R. 1027) anything. I remember that.

The Court: Well, as the sampler there in charge of taking samples, didn't it ever occur to you to take a

sample there at that minute, just as it came out of the spout, when the men came out and said that there was something wrong?

The Witness: Well, they cut the grain off, and I may have just took a cut. I don't remember that, but the grain was cut off and—

The Court: It seems to me like that would be an awful good time to take a sample, when you *had some reason to think there was something wrong with it, wouldn't it?*

The Witness: *Well,—it is not my job to determine if it is fumigated or anything; it is not my job to smell of the grain or anything. My job is to cut the grain and check it for weevils, for weevils or things of that nature. I am not supposed to smell of the grain or anything like that.*

The Court: Well, whether you were supposed to or not, you do not remember taking a sample immediately after you found that some complaint was made about the grain, is that correct?

The Witness: No, sir, I do not remember, taking a sample at that time (R. 1028).

The Court: All right. Now did you report the matter to Mr. Smelly?

The Witness: I don't recall.

The Court: As far as you know, you said nothing whatsoever.

The Witness: That's right."

The record is replete with evidence, first, of knowledge on the part of the Galveson Wharf officials and its employees that the grain being stored in their facility was fumigated inland before it was brought to the wharf; second, it was fumigated in railroad cars while awaiting transfer to the wharf facilities (R. 1059-1060); third, fumigated

in the bins; and fourth, such fumigated grain was transferred from one bin to another and, therefore, no record was maintained from which it could be determined whether the grain from the bins which were loaded on the GREL-MARION were fumigated or not; fifth, that the employees for the City as well as the agents for Cardigan, knew of the previous incidents where longshoremen, such as Petitioners, were injured while trimming grain by reason of fumigants on such grain. In spite of all of that knowledge, nothing was done in furtherance of the non-delegable duty to afford protection to these workers either by way of testing or by putting in portable blowers, available to the industry, to make the hatch seaworthy and provide these Petitioners with a safe place in which to work. The United States Coast Guard books and literature available to the shipping industry show what measures and precautions should and could be taken in the event of an occurrence such as occurred here. (See Appendix "G" attached hereto.)

The fact that the Wharves in Galveston, or any other place for that matter might have customarily done the work in the manner followed by the City and Cardigan does not excuse the failure to take necessary precautions to make the hatch seaworthy and supply Petitioners with a safe place in which to work. Reasonable care required Cardigan to provide blowers and force draft ventilation in the bin where Petitioners were working since they knew through their agents, not only of the previous incidents which took place in the Port of Galveston, but they also knew and had available to them, the advice Governmental Agencies, i.e. the Coast Guard, gave to the industry to provide either forced ventilation or blowers for the very purpose of preventing asphyxiation and the danger to Petitioners in the event a portion of the grain may be filled with fumigants or other noxious and poisonous chemicals. (*United N. Y. &*

*N. J. Sandy Hook Pilots Ass'n v. Halecki*, 70 S. Ct. 517, 358 U.S. 613.)

Neither can the shipping industry, nor the wharves, hoist themselves by their own boot straps by the device of setting up standards of conduct throughout the industry amounting to something less than reasonable care under all the existing circumstances and then predicate a defense of such sub-standards. The Federal and State Courts have long since laid to rest the ghost of this argument. As stated in the *T. J. Hooper* case, 60 F. 2d 737, at page 740:

"Is it then a final answer that the business had not generally adopted receiving sets? There are, no doubt, cases where Courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. *Ketterer v. Armour & Co.* (C.C.A.), 247 F. 921, L.R.A. 1918D, 798; *Spang Chalfant & Co. v. Dimon, etc., Corp.* (C.C.A.), 57 F. 2d 965, 967. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. *It never may set its own tests, however, persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. \* \* \**" (Emphasis ours.)

See also:

*State v. Clark*, 20 Atl. 2d 127, 130 (S. Ct. Del.).

"But there is a more fundamental objection. The Sheriff was charged with a duty to exercise that degree of care in the keeping of the crane which men in general exercise over property of this class. The custom or

practice shown related only to the cares which Sheriffs of New Castle County were accustomed to exercise over ponderous property under levy. The substantive law tells us that the standard of conduct for negligences, and that standard is a final one, and not dependent upon the conduct of others. To take the conduct of others as furnishing a sufficient legal standard of negligence would be to abandon the 'standards set up by the substantive law.'

As stated by Justice Holmes, in *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 23 S. Ct. 652, 47 L. Ed. 905:

"What usually is done may be evidence of what ought to be done is fixed by a standard of reasonable prudence. What has been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed, if they see in the case under consideration that it 'is not such conduct as prudent man would adopt in his own affairs.' *Manard v. Back*, 100 Mass. 40.

"Customs can not change the quality of an act; it can only aid in determining what that quality is. A party can not by his own continued negligence establish a custom by which he is made exempt from liability; nor is legal responsibility for negligence mitigated by the fact that others have been alike negligent. \* \* \*

It is, therefore, respectfully submitted that the Honorable Court of Appeals was in error in sustaining the Trial Court's finding that neither the City of Galveston nor Cardigan Shipping Company, Ltd. were negligent. And that

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<sup>1</sup> Wigmore on Evidence, 934.

such finding is clearly erroneous under the facts in this case.

An Appellate Court has the authority to examine and review questions of facts constituting negligence. *Bonnewell v. U.S.*, 179 F. (2d) 411.

*Anderson v. Lorentzen*, 160 F. (2d) 173;

*McFall v. Compagnie Maritime Belge*, 1952 A.M.C. 1860.

In any event the clearly erroneous doctrine is not without limitations. In *Romero v. Garcia Diaz, Inc.*, 286 F. (2d) 347 (2nd Cir.) the Court clearly defines the scope of the clearly erroneous rule as follows:

"Many decisions in this Circuit, some in civil actions and others in admiralty, have held that a judge's determination of negligence, as distinguished from the evidentiary facts leading to it, is a conclusion of law freely reviewable on appeal and not a finding of fact entitled to the benefit of the 'unless clearly erroneous' rule. *Sidney Blumenthal & Co. v. Atlantic Coast Line R. Co.*, 2 Cir., 1943, 139 F. 2d 288, 290, certiorari denied 1944, 321 U.S. 795, 64 S. Ct. 848, 88 L. Ed. 1084; *Barbarino v. Stanhope S.S. Co.*, 2 Cir., 1945, 151 F. 2d 553, 555; *Kreste v. United States*, 2 Cir., 1946, 158 F. 2d 575, 577; *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 2 Cir., 1947, 159 F. 2d 661, 665, certiorari denied 333 U.S. 836, 67 S. Ct. 1519, 91 L. Ed. 1849; *Guerrini v. United States*, 2 Cir., 1948, 167 F. 2d 352, 356, certiorari denied 335 U.S. 843, 69 S. Ct. 65, 93 L. Ed. 393; *Johnson v. United States*, 2 Cir., 168 F. 2d 886, 887; *Lynch v. Agwilines*, 2 Cir., 1950, 184 F. 2d 826, 828. Despite possible negative inferences that might have been drawn from *McAllister v. United States*, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20, we have continued to apply this rule

both in civil actions, *Dale v. Rosenfeld*, 2 Cir., 1956, 220 F. 2d 855, 858, and in admiralty, *New York, New Haven & Hartford R. Co. v. Gray*, 2 Cir., 240 F. 2d 460, 465, certiorari denied 1957, 353 U.S. 966, 77 S. Ct. 1050, 1 L. Ed. 2d 915; *Verbeeck v. Black Diamond S.S. Corp.*, 2 Cir., 1959, 269 F. 2d 68, 70. The basis of these decisions is that determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts found to be established. When all this has been done by a judge, a reviewing court has no means of knowing whether he formulated the standard correctly, since he does not charge himself. Thus there must be free review of his ultimate determination of negligence although not of the facts on which it was based."

### **Proposition Number Five**

The damages sustained by each Libellant, as found by the Trial Court, were grossly inadequate as a matter of law.

### **Argument and Authorities**

On its face, it is clearly apparent that the damages the Trial Court found the Petitioners sustained, are, under the evidence, wholly inadequate. The evidence shows as a matter of law Petitioners to be entitled to damages far in excess of the amount found by the Trial Court.

Viewing the evidence as a whole, no matter how one looks at the total amount of damages the Court found Petitioners to have sustained, it is clearly inadequate and insufficient. The total amount of compensation received by these Petitioners plus the medical expenses paid out by their employer's insurance carrier is approximately from one-half to seventy percent (70%) of the total amount of damages

allowed by the Court. See intervention by Petitioners' employer's insurance carrier (T.R. p. ). It is obviously insufficient because under the applicable compensation act, Title 33, Section 908, et seq., U.S.C.A., Petitioners were entitled to only two-thirds ( $\frac{2}{3}$ ) of their average weekly wages, not to exceed Fifty-four Dollars (\$54.00) per week, without considering pain and suffering, whereas by way of compensatory damages they are entitled to the full loss of their earning capacity, plus loss of future earning, plus compensation for the physical injury itself, which includes their inability to pursue generally the normal pursuits of life and the inconvenience of going through a period of time with an impaired bodily function. They are also entitled to damages for the fright, hysteria, pain and suffering sustained by them to the date of trial and beyond. Obviously, the Court took none of these facts into consideration. The evidence is undisputed that each of the Petitioners sustained substantial loss in earnings. All of them split their longshore work into three categories:

- (1) On banana boats;
- (2) Longshore work such as loading and unloading cargoes;
- (3) Trimming grain.

Unloading of banana boats requires very little, if any physical exertion because it is done mostly by machinery and all petitioners are required to do is supervise. The loading of dry cargo and the trimming of grain is extremely hard and strenuous work. While it is true that none of them sustained any substantial incapacity for the work of unloading bananas, they all sustained substantial loss of earnings by reason of their inability to do longshore work requiring strenuous or hard work and in grain trimming aboard vessels.

Each of the eight injured Petitioners were paid by their employer's insurer sixty-six and two-thirds ( $66\frac{2}{3}$ ) of their weekly wages as compensation under the Longshoremen's and Harbor Workers' Act, not exceeding \$54.00 per week, Title 33, Sec. 908 et seq. and medical expense. When this action was filed, the insurance carrier, as permitted under the then provisions of the law, stopped payment of further compensation. The eight Petitioners were paid compensation as follows:

**FIVE**—were paid compensation for a period of seven weeks;

**ONE**—for a period of two weeks;

**Two**—for thirteen weeks total disability and fifteen weeks partial disability as follows:

<i>Name</i>	<i>Medical</i>	<i>Comp.</i>	<i>Total</i>	<i>Award</i>
The five paid compensation for seven weeks				
Jesse Ovalle	\$216.75	\$ 416.75	\$ 633.32	\$1,000.00
Juan Arrendondo	71.75	378.00	449.75	1,000.00
Apolonio Ovalle	200.25	424.29	624.54	1,000.00
Miguel Serrato	49.00	325.22	374.22	1,000.00
Nick De Leon	216.75	408.86	625.61	1,000.00
The one paid compensation for two weeks				
Fidencio Balli	8.75	56.52	64.27	500.00
The two paid compensation for 13 weeks total and 15 weeks partial				
Miguel Mejia	302.75	1,372.05	1,674.80 <sup>1</sup>	1,500.00
Robert Morales	270.50	1,186.50	1,457.08	1,500.00

Without attempting to even intimate in the slightest that *any* of the awards are anywhere near adequate, it is apparent that the Court awarded the most to those who suffered the least.

After the trial was concluded, but before the Court rendered its findings of fact and conclusions of law, the em-

<sup>1</sup> Note: An error in addition in the stipulation filed sets out the total compensation and medical paid to be erroneously \$1457.08 instead of the correct amount of \$1674.80.

ployer's insurer filed its intervention to recover \$5,903.59 paid petitioners as compensation and medical expenses, plus a claim of \$1,750.00 as attorneys' fees or a total of \$7,653.59 claim out of the total \$8,500.00 awarded by the Court to all of the Petitioners. Therefore, out of the award of damages as made by the Trial Court to each Petitioner may be deducted the monies to be paid to intervenors, which may have to include their claim for attorneys' fees, as follows:

<i>Name</i>	<i>Comp. &amp; Medical</i>	<i>Award</i>	<i>Balance</i>
Jesse Ovalle	\$ 633.32	\$1,000.00	\$366.68
Juan Arrendondo	449.75	1,000.00	550.25
Apolonio Ovalle	624.54	1,000.00	375.46
Miguel Serrato	374.22	1,000.00	625.78
Nick De Leon	625.61	1,000.00	374.39
Robert Morales	1,457.08	1,500.00	42.92
Miguel Mejia	1,674.80	1,500.00	174.80
			(Minus)
Fidencio Balli	65.27	500.00	434.75

This \$1,750.00 claimed by intervenors as attorneys' fees will have to be paid out of the net amount left to the seven of these workmen. Miguel Mejia being completely struck out by his employer's insurance claim for subrogation since intervenors' claim against him is \$174.80 in excess of the total amount awarded him by way of damages.

An examination of Petitioners' Appendix 10 (stipulation of each Petitioner's earnings for the year 1956 before they received their injuries and 1957, the year of their injuries) evidences the substantial losses they sustained during the year of 1957 without taking into consideration the loss sustained by them subsequent to 1957 to the date of trial, and in the future.

For the Court's convenience we set them out below:

*Total  
Earnings*      *Loss*

**MIGUEL MEJIA**

1956, the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$4,249.97		
1) Earnings unloading bananas	1,131.03	\$5,381.00	
1957 Earnings doing longshore work other than unloading bananas	1,945.94		
Earnings loading bananas	1,154.06	3,100.00	
An actual loss in 1957 in the sum of			\$1,149.49

**ROBERT MORALES**

1956, the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$3,086.45		
Earnings unloading bananas	1,767.89	4,854.34	
1957 Earnings doing general longshore work, other than unloading bananas	1,222.47		
3) Earnings longshoring bananas	1,808.90	3,031.37	
An actual loss in 1957 in the sum of			1,822.97

**NICK DE LEON**

1956, the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$3,527.41		
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		<i>Total Earnings</i>	<i>Loss</i>
2)	Earnings unloading bananas	1,840.70	5,368.11
1957	Earnings doing general longshore work, other than unloading bananas	1,124.90	
	Earnings unloading bananas	1,805.83	2,930.73
	An actual loss in 1957 in the sum of		2,402.51

## A. R. OVALLE

1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$3,715.89	
5)	Earnings unloading bananas	1,725.04	5,440.93
1957	Earnings doing general longshore work, other than unloading bananas	2,341.93	
	Earnings unloading bananas	1,790.26	4,132.19
	An actual loss in the sum of		1,308.74

## JESSE OVALLE

1956,	the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$4,042.57	
4)	Earnings unloading bananas	1,927.81	5,970.38
1957	Earnings doing general longshore work, other than unloading bananas	2,650.87	
	Earnings unloading bananas	1,749.54	4,400.41
	An actual loss in 1957 in the sum of		1,569.97

## J. ARRENDONDO

		<i>Total Earnings</i>	<i>Loss</i>
1956, the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$1,735.79		
6) Earnings unloading bananas	1,992.10	3,727.89	
1957 Earnings doing general longshore work, other than unloading bananas	502.92		
Earnings unloading bananas	2,058.37	2,561.29	
An actual loss in 1957 in the sum of			1,166.60

## MIGUEL SERRATO

1956, the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$3,392.55		
7) Earnings unloading bananas	231.44	3,623.99	
1957 Earnings doing general longshore work, other than unloading bananas	1,676.35		
Earnings unloading bananas	1,436.77	3,113.30	1,676.35
An actual loss in 1957 in the sum of			510.69

## F. BALLI

1956, the year previous to his injuries, his earnings doing general longshore work, other than unloading bananas	\$1,248.26		
Earnings unloading bananas	1,761.74	3,010.00	

		<i>Total Earnings</i>	<i>Loss</i>
1957 Earnings doing general longshore work, other than unloading bananas	70.19		
Earnings unloading ba- nanas	2,143.64	2,213.83	
An actual loss in 1957 in the sum of			796.17

These figures represent actual losses of earnings during 1957 and without taking into consideration the loss of earnings to the date of trial (July 1958) or in the future, nor medical expenses, damages for pain and suffering, etc. From the foregoing figures it is crystal clear that these Petitioners were not awarded even the loss of actual wages during the year of 1957.

The elements of damages to be considered in cases such as these have been heretofore discussed. We trust that it would be of aid to the Court to set out under each of Petitioners' names a formula awarding fair and reasonable but adequate damages suffered by each one of them.

#### JESSE OVALLE

1956 Total Earnings .....	\$5,970.38	
Of which longshoring work (trimming grain and load- ing or unloading cargo other than bananas) was .....	\$4,042.57	
1957 Earnings in longshoring work (trimming grain, loading and unloading car- go other than bananas) was .....	\$4,042.57	
Loss in wages in 1957 .....		\$1,391.70
In view of the hysteria and his fear to work with grain in the future, loss of wages in the future can be reasonably and conservatively set at .....		\$1,000.00
Medical expenses (as per stipulations) .....		216.75
Pain and suffering, including fright and mental anguish should be conservatively set at .....		1,500.00
Total Damages .....		<u>\$4,108.45</u>

## FIDENCIO BALLI

1956	Total Earnings .....	\$3,010.00	
	Earnings other longshoring work, other than bananas .....		\$1,248.26
1957	Earnings other longshoring work, other than bananas .....		70.19
	Loss in wages in 1957 .....		\$1,178.97
	Loss of earnings in the future .....		1,000.00
	Medical expenses .....		8.75
	Pain and suffering .....		1,500.00
	Total Damages .....		\$3,687.72

## JUAN ARRENDONDO

1956	Total Earnings .....	\$3,727.89	
	Earnings other longshoring work, other than bananas .....		\$1,735.79
1957	Earnings other longshoring work, other than bananas .....		502.92
	Loss in wages in 1957 .....		\$1,232.87
	Loss of earnings in the future .....		2,000.00
	Medical expenses .....		71.75
	Pain and suffering .....		1,500.00
	Total Damages .....		\$4,804.62

## MIGUEL MEJIA

1956	Total Earnings .....	\$5,381.00	
	Earnings other longshoring work other than bananas .....		\$4,249.97
1957	Earnings longshoring work, other than bananas .....		1,945.94
	Loss in wages in 1957 .....		\$2,304.03
	Loss of earnings in the future .....		2,000.00
	Medical expenses (see stipulation) .....		302.75
	Pain and suffering .....		2,000.00
	Total Damages .....		\$6,606.78

## APOLONIA OVALLE

1956	Total Earnings .....	\$5,440.93	
	Earnings other longshoring work .....	\$3,715.89	
1957	Earnings longshoring work, other than bananas .....	2,341.93	
	Loss in wages in 1957 .....		\$1,373.96
	Loss of earnings in the future .....		2,000.00
	Medical expenses .....		200.25
	Pain and suffering .....		1,500.00
	Total Damages .....		\$5,074.21

## MIGUEL SERRATO

1956	Total Earnings .....	\$3,623.99	
	Earnings longshoring work, other than bananas .....	\$3,392.55	
1957	Earnings other longshoring work, other than bananas .....	1,676.35	
	Loss in wages in 1957 .....		\$1,716.20
	Loss of future earnings .....		1,000.00
	Medical expenses .....		49.00
	Pain and suffering .....		1,500.00
	Total Damages .....		\$4,265.20

## ROBERT MORALES

1956	Total Earnings .....	\$4,854.34	
	Earnings longshoring work, other than bananas .....	\$3,086.45	
1957	Earnings longshoring work, other than bananas .....	1,222.47	
	Loss in wages in 1957 .....		\$1,863.98
	Loss of earnings in the future .....		2,000.00
	Medical expenses (see stipulation) .....		270.50
	Dr. Mendell .....		258.34
	Pain and suffering .....		2,000.00
	Total Damages .....		\$6,392.82

## NICK DE LEON

1956 Total Earnings .....	\$5,368.11	
Earnings longshoring work, other than bananas .....		\$3,527.41
1957 Earnings longshoring work, other than bananas .....		1,124.90
<hr/>		
Loss in wages in 1957 .....		\$2,402.51
Loss of earnings in the future .....		2,000.00
Medical expenses (see stipulations) .....		216.75
Dr. Mendell .....		222.83
Pain and suffering .....		2,000.00
<hr/>		
Total Damages .....		\$6,842.09

These losses are for actual loss of earnings during 1957 and without taking into consideration the loss of earnings to the date of trial (July 1958) or in the future.

The only possible reasoning the Court could have followed in arriving at the inadequate amount of damages it found to have been sustained by Petitioners is to assume that the Court considered their earnings while they were engaged in the extremely light and unstrenuous work of unloading bananas during the time they were under the care of their employer's insurance carrier's doctors and wholly disregarded the proven fact that Petitioners, because of the injuries they received, plus the hysteria and fear produced by the dramatic and fearful incident on March 14, 1957, on board the GRELMARION, they were unable to and did not work any grain ships and did very little work in loading or unloading other dry cargo ships all of which involved hard, strenuous labor. But even assuming the Court's disregard of the Petitioners' inability to work on dry cargo ships and grain trimming, it is difficult to understand how the Court arrived at such low figures in its damage finding. See *Davis v. Grace Steamship Co.*, 10 F. Supp. 284. In the *Davis* case, the Court under similar circumstances but only five days loss of earnings, allowed Libellant \$750.00 by way of damages. The Court found Davis' injury to have oc-

curred on September 9, 1953, at which time he was suffering from no ill effects. Keeping in mind that in 1953 long-shoremen's wages were substantially less than in 1957, the Court allowed close to \$750.00 for pain and suffering alone.

In order to properly and realistically evaluate the loss sustained by each of the Petitioners in this case the total scope of their work must be taken into consideration, not only part of it. Clearly these Petitioners prior to their injuries worked (a) banana boats (which is seasonal and does not involve any manual labor); (b) general loading and unloading of cargo of all types and commodities and (c) loading and trimming of grain. Both Dr. Jenkins and Dr. Adriance have testified to the actual organic damages and injuries to each one of these Petitioners and both of them testified that in addition to these injuries, and as a direct consequence thereof, each of them suffered of hysteria, danger of future injury if they were to come either in contact with grain or trimming grain. All the doctors advised them to stay away from grain boats for a substantial period of time because recurrent attacks by chemicals, such as these Petitioners were subjected to, injurious both to lungs and liver, may so aggravate their previous condition as to cause serious and permanent danger. All doctors, including those brought forward by Respondents, agreed that all of these men were suffering from hysteria, and that they needed medication, and constant reassurance so that they could return to normal work, with the exception of refraining from work with grain.

We respectfully urge this Court, after reviewing the evidence, to award damages for loss of actual earnings during the years 1957 and 1958, and an adequate and reasonable amount for the physical insult to their bodies and for pain and suffering, past and future. It is only then that justice under the law and in admiralty would be ac-

complished or alternatively remand the portions of this case dealing with damages to the Appellate Court for review.

It would serve no useful purpose to remand the case to the trial court in order to have a reassessing or reconsideration of damages as suggested in the dissent by Judge Rives.

Appellate Courts have the authority to review the sufficiency of damages and award damages that will fairly and reasonably compensate Petitioners for their hurt as warranted by evidence.

- Imperial Oil Co., Ltd. v. Drlik*, 234 F. 2d 4;
- John Farley v. United States*, 252 F. 2d 85;
- Ross v. Zeeland*, 240 F. 2d 820;
- Johnson v. Griffith S.S. Co.*, 150 F. 2d 224 (C.C.A. 9th Cir.);
- The Mack*, 154 F. 2d 711 (C.C.A., 5th Cir.);
- Waterman Steamship Corporation v. U.S. Smelting, Refining & Mining Company*, 155 F. 2d 687 (C.C.A., 5th Cir.);
- Porello v. United States* (C.C.A., 2nd Cir.), 153 F. 2d 605; 330 U.S. 546, 67 S. Ct. 847;
- Landgraf v. United States of America*, 75 F. Supp. 58, at p. 61;
- In re Walsh, U.S. Fidelity & Guaranty Co. v. U.S.A.*, 1945 A.M.C. 1513 (C.C.A., 2nd Cir.), 152 F. 2d 46;
- Stuart v. Alcoa S.S. Co.*, 1944 A.M.C. 911 (C.C.A., 9th Cir.), 153 F. 2d 178;
- Wajdak v. United States of America*, 170 F. 2d 908.

The decision of the Court below is directly contrary to and in conflict with the Court decision of *Mitchell v. The Trawler Racer* of May 16, 1960. It is important that the

principles of Maritime Law be uniformly applied and enforced.

### **Conclusion**

For the foregoing reasons, Petitioners respectfully pray that the judgment of the United States District Court and that of the Court of Appeals for the Fifth Circuit be reversed, and upon reversal, either increase the damages in an appropriate amount or remand the case to the Court of Appeals to consider the inadequacy of the damages.

Respectfully submitted,

MANDELL & WRIGHT

By ARTHUR J. MANDELL  
*Attorney for Petitioners*

## Appendix A

"9. The CRELMARION began loading the morning of March 13, 1957, and continued without incident throughout that day and the following morning, until interrupted for the lunch hour on March 14. When the longshoremen returned to work in the offshore bin of the No. 2 hold at about 1 p.m., on March 14, 1957, the bin was approximately three-fourths full, the grain then extending to within some four or five feet of the top of the bin. A last 'shot' of grain was called for, and was released into the bin. *This quantity of grain completely covered the hatch opening* (which was the only means of entrance and exit for the longshoremen, *and was the only source of ventilation*); the longshoremen were working for the moment in an area, *completely enclosed and without access to outside air*. This in itself was not an unusual incident. (Emphasis ours.)

10. Almost immediately the longshoremen felt ill effects. This was manifested by a burning and stinging sensation in the nose and throat, watering of the eyes, and a choking sensation. A certain amount of hysteria developed. The attention of those on deck was attracted, and the spout was shut off. The men dug a passageway through the grain and climbed and were assisted to the deck and the open air. Some experienced nausea and dizziness.

11. I find as a fact that certain noxious fumes and gases were introduced into the bin with the last 'shot' of grain which was loaded after 1 p.m., and that such fumes resulted from an insecticide applied at some point to destroy weevil infestation. I further find that the condition and complaints of the Petitioners were

not—as the Respondent City contends—attributable solely to a temporary oxygen deficiency in the bin, coupled with hysteria.

19. The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. . . . "

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IN THE  
**Supreme Court  
of the United States**

OCTOBER TERM, 1961

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No. 480

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ROBERT MORALES, ET AL,  
*Petitioners*

vs.

CITY OF GALVESTON, ET AL,  
*Respondents*

---

**RESPONDENT CITY OF GALVESTON'S  
BRIEF ON THE MERITS**

---

MCLEOD, MILLS, SHIRLEY & ALEXANDER  
PRESTON SHIRLEY

801 Santa Fe Building  
Galveston, Texas

*ATTORNEYS FOR RESPONDENT,  
CITY OF GALVESTON*

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**RESPONDENT CITY OF GALVESTON'S  
BRIEF ON THE MERITS**

---

**TO THE HONORABLE THE CHIEF JUSTICE  
AND THE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES:**

**PRELIMINARY STATEMENT**

This suit was originally brought both against this Respondent City of Galveston (hereinafter referred to as the City) as owner and operator of a grain ele-

vator on a charge of actual negligence and against the shipowner and operator, Cardigan Shipping Company, Ltd., on charges of unseaworthiness and, in addition, actual negligence. As to us—the City of Galveston—the Trial Court found, as a matter of fact, that we were not negligent (181 F. Supp. 191). The Court of Appeals for the Fifth Circuit affirmed for us on the same grounds (272 F. (2d) 191).

On Petition for Certiorari, this Court remanded the case to the Court of Appeals in a memorandum opinion stating:

“ \* \* \* The judgment of the Court of Appeals is vacated and the case is remanded to that court for consideration in light of *Mitchel v. Trawler Racer, Inc.*, 362 U. S. 539.” (364 U. S. 295)

**Mitchel vs. Trawler Racer, Inc.** related solely to the question of unseaworthiness, a matter with which we are not involved. The case then went back to the Court of Appeals and was re-argued solely on the doctrine of unseaworthiness. The additional argument made in the Court of Appeals did not relate to us at all (291 F. (2d) 97). The case then came back to this Court with Petitioners' present application again disclosing that we were not substantially involved. In fact, the three “reasons relied upon for the allowance of the writ” dealt solely with the charge of unseaworthiness. The City is not involved on this point. The City owned and operated the grain elevator; it had nothing to do with the ownership and operation of the ship.

We have now been furnished with Petitioners' Brief on the Merits and from the City's point of view, find it somewhat difficult to organize a brief answer. Under the item of "Questions presented for review", the first six questions deal with the doctrine of unseaworthiness with which we are not concerned. The seventh question is based upon alleged prior incidents which were found by the Trial Court not to be the same as those presented here and could be briefly answered. This same question is carried forward as Petitioners' Proposition No. 4 (Petitioners' Brief Pg. 25). However, most of Petitioners' argument under this proposition (insofar as directed against us) apparently is an effort in a fragmentary manner to raise numerous alleged fact questions which have been determined in our favor. Petitioners have made no effort to review all of the testimony but have referred only to isolated passages. Perhaps the explanation for this type of argument is that with the exception of the first page under Proposition No. 4, Petitioners are merely quoting arguments previously made on fact questions.

The only other point possibly directed against us is Petitioners' Proposition No. 5 (Petitioners' Brief Pg. 34) to the effect that the damages found by the Trial Court were inadequate.

In answer to the small portion of Petitioners' Brief directed against us, we reply with two Counter Propositions—the first, that the Trial Court properly found that we were not negligent and the second, that the Trial Court's findings of damages were correct.

## FIRST COUNTER PROPOSITION

The Trial Court and the Court of Appeals properly held that the Respondent City of Galveston was not negligent.

## STATEMENT AND ARGUMENT

In order to demonstrate the correctness of the Trial Court's fact findings, affirmed by the Court of Appeals, and, in addition, to demonstrate that the findings of fact, under **McAllister vs. United States**, 348 U. S. 19 (1954), were not clearly erroneous, we must substantially review the evidence.

Elevator B, owned and operated by the City, is an export elevator. It receives grain by rail shipment from inland points for the purpose of temporary storage and subsequent shipment overseas (R. 577). The general method of operation is for an exporter to ask the City for room to accumulate a specified amount of grain that he expects to ship abroad. The grain will originate inland and travel to Galveston by rail arriving in the line haul railroad carriers yard near the elevator. On arrival of a car, the Galveston Cotton Exchange and Board of Trade grain department samplers go to the line haul railroad yards, break the seal on the car, open it and take samples from each car. The sample is then brought to that organization's laboratory (R. 596). After the grain has been graded, the Wharves' car clerk notifies the line haul railroad to give the elevator the car. The City, using its own equipment, spots the car on City tracks adjacent to the elevator (R. 598). The car is then pulled

over the unloading pit. Two City employees using power shovels go into the car and unload the grain, the grain falling by gravity into the unloading pit underneath the car (R. 600-601). As the car is unloaded, an elevating leg, i. e., a rubber conveying belt with approximately 1,000 small buckets on it, takes the grain out of the unloading pit (R. 604) and raises the grain vertically to the top of the elevator where it is weighed. After being weighed, the grain is then released through the bottom of the scale into chutes (R. 606), travels through the chutes down through two distribution floors by gravity (R. 608) and is delivered onto rubber conveyor belts which travel the entire distance of the storage section and which carries the grain until it reaches the point of discharge into a storage bin (R. 609).

When the owner of grain desires to export, such owner will instruct the elevator to load a specified number of bushels of a certain grade (R. 615). Information is given as to the name of the vessel to which the grain is to be delivered. Prior to arrival of the vessel, the elevator foreman will prepare a line-up which is a listing of a number of storage bins from which grain is to be taken to make delivery of the desired grade (R. 616). The mixture is usually made of various grades which when taken together in proper proportion will come out as the grade desired (R. 616-617). A correct mixture results from taking grain from several bins as listed on the line-up—i. e., so much of one grade and so much of another, with the amount from each bin determined by the size of the opening (notches) at the bottom of the bin where the grain

leaves the bin and goes onto the conveyor belt. The grain thus taken out of the bottom of the several storage bins as listed on the line-up, will by use of an open conveyor belt be transferred from these various bins until it comes to a common point at the bottom of the elevating leg (R. 619). The grain then goes on a joint belt up to the scale (R. 620). It then falls into the scale and is weighed and, through spouting and chuting, it goes onto a belt which delivers it from the workhouse to the wharf (R. 620). After reaching the wharf, it goes into a shipping bin, which is above the shipping gallery and immediately above the ship to be loaded (R. 620). The stevedore at this time will have the dock's spout in position. The stevedore then telephones to the elevator, telling them to start releasing the grain (R. 621). An interesting description of this whole operation may be found in the testimony of Elevator Superintendent D. L. Carroll (R. 593-623).

On the question of chemical agents on the grain, on isolated occasions, fumigants are used to stop weevil infestation. It is possible for the grain to have been fumigated at an inland elevator before arriving in Galveston (R. 676). If the grain is ever found to be weevilly in the railroad cars before unloading, it will be fumigated (R. 624) and, on occasion, when grain in the elevator becomes weevilly, it will be fumigated in the storage bins (R. 624). The purpose of the fumigation is to kill the weevils.

With this brief description of the elevator operations in mind, we again revert to Petitioners' position

here. Petitioners primary position as contained in their Second Amended Libel was that the City negligently fumigated the grain (Libellants' Second Amended Libel, Tr. 30). The Trial Court found, as a matter of fact, that the City did not fumigate the grain (Findings of Fact No. 12, Tr. 87-88). Additionally, the Petitioners apparently contended that if the City did not fumigate the grain, it was still liable for having failed to detect the presence of possible fumigants on the grain when it arrived from inland points. The Trial Court found that the City did not know, and in the exercise of reasonable care, could not have known, that the grain had been improperly fumigated at an inland point (Findings of Fact No. 15, Tr. 88). Unless these and other findings of the Trial Court (affirmed by the Court of Appeals), are clearly erroneous, this cause must be affirmed as to the City.

THE TRIAL COURT PROPERLY FOUND  
THAT THE CITY DID NOT FUMIGATE  
THE GRAIN WHILE IN ITS POSSESSION.

Actually, we are not sure whether Petitioners attack this finding (Finding No. 12) but out of an abundance of precaution, will demonstrate its correctness. The only two places where the City can fumigate the grain is when it is in railroad cars prior to unloading or is stored in the elevator bins.

THE TRIAL COURT CORRECTLY FOUND  
THAT THE GRAIN WAS NOT FUMIGATED  
IN THE RAILROAD YARDS.

The Trial Court found that when grain is received and while it remains in the railroad yards, the City fumigates grain when inspection indicates that fumigation is necessary; that high-life is used as a fumigant; that high-life is poured at various places over the top of the grain; that the cars which are so treated are segregated and after a matter of several days, the grain is placed in the elevators; and that a careful record is kept of the cars so treated and of the grain withdrawn from such cars (Finding No. 12, Tr. 87). These findings are sustained by the undisputed evidence. When a railroad car arrives in a line haul carrier's yard, a pan ticket (railroad car record ticket—Exhibits C and D) is prepared. Galveston Cotton Exchange & Board of Trade samplers open the car and take samples (R. 596). These samples are taken to the Galveston Cotton Exchange & Board of Trade laboratories where the required grading tests are performed under the United States Department of Agricultural standards (R. 596). After the cars are inspected, the pan ticket, in the absence of anything unusual, is passed to the elevator and rests with the elevator's car clerk until the order for unloading comes up (R. 598). As the cars are spotted, the pan ticket moves from the elevator office to the car clerk, who goes to the track prior to pulling the car under the shed, where the car is checked by an elevator employee for any abnormalities and this employee in turn forwards the pan ticket to the bin room man who again goes to the car and checks the car to see if everything is correct; after doing this, the bin room man places the pan ticket into the cardex system and then for-

wards it to the scale floor. After the ticket arrives there, the weigher takes the ticket and the weight is stamped on it (R. 599). The pan ticket then goes to the bin room so that the bin room man may record the weight on the particular bin in which the grain was placed (R. 600). The pan tickets remain a permanent record of the elevator (R. 603).

If when the Galveston Cotton Exchange & Board of Trade inspectors and samplers on the first inspection while the railroad car is in the yard, determine that the grain is weevilly, this fact is set out on the pan ticket and before the car is unloaded the city employees, using high-life, go to the car, open it and pour four gallons of high-life in the car. After the car is fumigated and sits 24 hours, the city calls for a re-inspection (R. 626). The Cotton Exchange inspectors after 48 to 72 hours after fumigation reinspect the car (R. 805) and issue a clear certificate at which time the car is then ordered for unloading. During the period of time involved in this suit, high-life was the only fumigant used in this operation. On the pan ticket of each car treated prior to being unloaded, a notation to that effect will appear (R. 626). A list of all cars so treated during any time possibly material to this suit was introduced (City Exhibit E and R. 627, 631, 936). Taking the cars so treated and going through the other city records, it was shown that none of the cars so treated could have gone aboard the GRELMARION (R. 630-634 and 640-641). An expert witness, on being given the nature of the symptoms testified to by Petitioners, testified that the harmful fumigant causing the incident here could not have

been high-life (R. 878-880) and in addition, testified that weevilcide which in part contains the same ingredients as high-life would not be dangerous even in a bin provided 24 hours elapsed after fumigation (R. 871-872). As previously shown, if high-life was applied in the railroad car, the car was withheld from unloading at least 48 hours. There is no evidence that high-life or any fumigant applied to railroad cars caused the incident involved. Additionally, Galveston Board of Trade inspectors would inspect the car after high-life had been applied before granting a certificate to unload it. (R. 626 and 805).

**THE TRIAL COURT CORRECTLY FOUND  
THAT THE GRAIN WAS NOT FUMIGATED  
WHILE IN ELEVATOR B.**

The Trial Court found that from the books and records of the City, from the effects which the fumes had had upon the Libellants and the symptoms manifest by them, the fumes causing the incident were from chloropicrin, an insecticide which had never been used by the City and which in all probability was applied at some inland elevator before the grain was transported to Galveston (Finding No. 12). The Court further found that it is the practice of the City to keep careful records of each bin so fumigated and to leave the contents undisturbed for a period of at least 72 hours (Finding No. 6, R. 84). These findings apparently are not attacked here and are correct. The City's Wharves General Manager, its Superintendent, General Foreman and Foreman each testified to the accuracy of the Wharves' books and records

(R. 676, 643, 659, 1035, 1052-1054). No doubt was cast upon the credibility, honesty, integrity or truthfulness of these witnesses. The essence of the testimony of each of them, with the exception of the General Manager, who was not present and who did not have immediate custody of the records, was to the effect that a fumigant record (Exhibit BB) was kept which accurately and completely showed each and every time any grain in the elevator was fumigated (R. 659-665, 1050-1054 and 1032-1036). City Exhibit BB, the fumigation record book, shows that some hard winter wheat in Bin A-261 was fumigated on December 3, 1956. The next wheat fumigated was in Bin 62 on January 27, 1957 and again on February 4, 1957. From December 3, 1956 down to the date loading commenced on the GRELMARION, these two bins were the only bins of wheat fumigated and were necessarily the only wheat of any kind fumigated in the elevator. The fumigant so used in these bins was weevilcide (R. 660). The undisputed testimony is that after 24 hours, it is safe to load grain which has been fumigated with weevilcide and from the last date of these fumigations, i. e., February 4, 1957 to the date of the incident, March 14, 1957, there was no possibility of weevilcide hurting or injuring anyone (R. 870-74).

In addition, the fumigation record shows that Bin C-225 was fumigated on March 12, 1957. However, this bin could not have been used because (1st) it is not shown on the line of the bins to be used (Exhibits F through W exclusive of Exhibits H. Q and R) and (2nd) 72 hours after fumigation is always required before any fumigating grain is put aboard a vessel

(R. 1047-1049). The net effect of the undisputed testimony is that by comparing the line-up or records of grain used to load the ship (City's Exhibits F through Z exclusive of Exhibits H, Q and R) and examining the fumigation records (City Exhibit BB) no grain fumigated in the elevator went aboard the ship (R. 642-665, 1032-1036, 1051-1054). Further, all Petitioners testified that they first felt a tearing of their eyes as distinguished from smelling anything and that they had throat constriction and certain chest pains. The evidence is undisputed that weevilcide, the fumigant used in the elevator, would not cause this tearing of the eyes (R. 862) and would not cause a throat or chest constriction (R. 873).

The above is only a portion of the testimony on this point but we believe is sufficient to demonstrate the correctness of the Trial Court's finding. Petitioners' only attack upon all this testimony is that fumigated grain sometimes might be transferred from one bin to another. (Petitioners' Brief, Pg. 26). The answers to this contention are numerous: (1st) as shown by City Exhibit BB, Pg. 35, even assuming that grain had been transferred from one bin to another, nevertheless, the only wheat which had been fumigated in the elevator since December 3, 1956 was one bin on December 3, 1956, another bin on January 27, 1957 and again on February 4, 1957, and all effects of any such fumigation would have been dissipated long prior to March 14 (R. 874); (2nd) the uniform practice of the Wharves was not to move any grain which had been fumigated until the expiration of 72 hours which is the safe tolerance for any exposure (R. 1047-1049).

In Petitioners' argument under this point, they make references to certain other incidents alleged to be similar. Whatever may have been the evidence in each such incident, the fact of litigation and/or settlements could not be used here to prove a fact of fumigation which is a fact to be tried in this lawsuit under the evidence introduced here.

THE TRIAL COURT'S FINDING THAT THE CITY DID NOT KNOW AND IN THE EXERCISE OF REASONABLE CARE SHOULD NOT HAVE KNOWN THAT THE GRAIN HAD BEEN IMPROPERLY TREATED WITH AN EXCESSIVE AMOUNT OF FUMIGANTS IN AN INLAND ELEVATOR IS PROPER (FINDING NOS. 7, 8, 12, 14, 15 and 16, Tr. Pgs. 84-89).

We have shown that the grain was not fumigated while in Galveston either in the yards or in the elevator. At times grain is treated at inland elevators prior to being shipped to Galveston. (R. 676). The Trial Court found that a fumigant by the name of chloropicrin was put upon the grain at some inland elevator. (Finding No. 12). The Court further found that the normal and customary application of chloropicrin at inland point would not be harmful under the circumstances here unless an unduly large quantity had been improperly applied; that the City did not know and in the exercise of reasonable care could not have known that the fumigant had been improperly

applied at some inland point and had never received knowledge of any prior instance where chloropicrin or other fumigants applied at inland elevators had adhered to the grain long enough to present a danger after receipt at the elevator and that the City was not negligent in failing to know or learn of the presence of this quantity of chloropicrin in view of all examinations and inspections made of the grain. (Findings Nos. 14, 15 and 16). The Petitioners do not attack these findings here. The testimony is to the effect that considering the symptoms and testified to by Petitioners, the harmful fumigant here was chloropicrin. (R. 879-880 and 895). It is undisputed that chloropicrin properly applied at an inland elevator or elsewhere, would represent no hazard to later handlers of grain (R. 919-920) but it is the misuse of the product which causes the trouble. (R. 922).

The undisputed evidence shows that the Galveston Wharves Elevator B has been in operation for many years. Millions upon millions of bushels of wheat have been shipped from inland points to the elevator and through the elevator for export without any inland fumigation causing any trouble (R. 597, testimony of witness Carroll of an average of approximately 38 million bushels a calendar year for each of the last five years —R. 712; testimony of Sandberg that from the time that he took over in May, 1954 until the GRELMARION incident, there have been no unusual occurrences—R. 576). The elevator follows the same procedures as are followed by all other export elevators (R. 671) and there is no evidence of this result ever happening before anywhere,

We pause here to remark that Appellants apparently rely upon the LIPSCOMB LYKES incident in 1949, the PANAMOLGA incident in 1950, and the ZOSIANNE incident in 1953. However, as shown by Finding No. 17, each of these cases involved a finding or claim that the City itself had fumigated the grain and was, therefore, liable. None of the claims involved a finding or claim by the Plaintiff that the fumigant had been improperly applied at an inland elevator.

Under these circumstances, the facts are clear that as in the case of all elevators, the City as operator of Elevator B knew that wheat on occasion was fumigated inland; it also knew that millions upon millions of bushels of wheat had gone through Elevator B without any incident involving inland fumigation; it knew that millions upon millions of bushels of wheat had gone through other export elevators without incident; it knew that if fumigants were properly applied inland, the effects would be dissipated before arrival in Galveston and it had a right to presume that anyone fumigating grain at inland points would do it properly and further that anyone shipping wheat that had been fumigated in such a manner as to make it harmful to humans would notify the elevator.

EVEN ASSUMING THAT, CONTRARY TO FACT, THE CITY HAD NOTICE THAT CHLOROPICRIN MIGHT AT TIMES HAVE BEEN IMPROPERLY APPLIED AT INLAND ELEVATORS AND ASSUMING THAT SOME DUTY EXISTED TO IN-

SPECT THE GRAIN TO DETERMINE WHETHER IT HAD BEEN FUMIGATED INLAND, THIS DUTY HAS BEEN COMPLIED WITH IN A REASONABLE MANNER.

The Trial Court found that the grain had been inspected in a reasonable manner. (Finding Nos. 7, 8, 15 and 16). This finding is correct. When the railroad cars first arrived in the Galveston yards, the Galveston Cotton Exchange Board of Trade samplers would break the seal on each car and go in and take samples from some five different places in the car (R. 596-597, 801); samples were then taken to the Galveston Cotton Exchange's laboratories where inspectors employed there perform the necessary tests to establish the quality of the grain. (R. 597). These inspectors are licensed by the Department of Agriculture and supervised by them. (R. 668, 798). While these inspectors and samplers are primarily interested in the grade of the grain, odors are a part of the grade, and these inspectors are interested in and inspect for foreign odors. (R. 675). When taking the samples, if the sampler encounters any odors in the car, he will note this fact on the pan ticket covering that particular car and when the grain comes to the laboratory, the inspector will make the final decision as to odors (R. 802). After samples are taken and the grain, among other things, tested for odor, if the odor is sufficient, a notation will be placed of "commercially objectionable foreign odors". (R. 804). The odor test is made by the inspectors sense of smell. (R. 805). If the car is found weevilly and is fumigated in the

yards, a subsequent inspection will be made by Board of Trade people some 48 to 72 hours later. (R. 805). Throughout the entire operation in the elevator, all elevator personnel are also on the alert for any foreign odors. When the car is unloaded over the unloading pits, two Galveston Wharves employees work in the car using mechanical shovels and sweeping it out for approximately one hour (R. 601). The grain is thoroughly aerated on moving through the elevator. When the grain is redelivered from the bins enroute to ships, the men running the grain belt, which is receiving the grain from the various storage bins, have the duty of watching and examining the grain, including a continuous odor test by ordinary smelling processes. (R. 676-677).

As the grain is delivered into the hold of the ship, a sampler of the Galveston Cotton Exchange & Board of Trade takes samples at regular intervals (R. 810) and a part of both the samplers and inspectors duty is to detect odors in the grain (R. 811-812). These inspectors are supervised by the Department of Agriculture men in many instances. (R. 812). The Galveston Board of Trade samplers and inspectors inspected the grain that went aboard the SS GRELMARION. (R. 813). The chief inspector identified the log of the GRELMARION (Exhibit DD) and stated by reason of absence of any notations of odors, it would appear that according to his inspectors, no odors were indicated on the grain loaded aboard the GRELMARION. (R. 821-822). Similarly, the testimony of Carl W. Boozer, Commercial Grain Inspector for the Galveston Cotton Exchange was to

the effect that he was aboard the GRELMARION during the loading of that vessel and that no unusual odors were noted. (R. 940-943). He also testified that there was a United States Department of Agriculture Grain Inspector present. (R. 944-945). The method of inspection is shown through the testimony of Mr. Boozer. The same is true of sampler Fred H. Walker, the Galveston Cotton Exchange & Board of Trade employee, who testified that there were no unusual odors noted while loading the GRELMARION. (R. 994-996). The same is true of the testimony of Billy Ray Goss, a grain sampler, for the same organization, who worked the GRELMARION and smelled nothing unusual as a part of his sampling or inspection duty. (R. 1017-1027). J. P. Smelley, inspector for the United States Department of Agriculture testified that his inspectors worked the GRELMARION and nothing unusual happened relative to any fumigant odors. (R. 1010). The witness Siegfried Freeman, a grain supervisor for the United States Department of Agriculture testified that his organization tested grain for, among other things, odors (R. 959); that he supervised the loading of the GRELMARION (R. 960); that the sampler had instructions if they caught a foreign odor to immediately cut the ship off (R. 961) and that nothing happened aboard the GRELMARION of unusual nature according to his records (R. 962). It is submitted that the above testimony clearly shows that the grain was at all times adequately and reasonably inspected.

Appellant apparently complain that no chemical tests were made. However, it is shown that this is

not done anywhere in the industry (R. 671) and this would be contrary to the custom of the trade. Also such a proposed test would be impractical and as a matter of fact, it would be practically impossible to detect chloropicrin clinging on a very few bushels of grain. In this connection, it must be remembered that under the undisputed testimony, if chloropicrin is properly applied at an inland elevator, it will cause no damage but the only way that it could cause any possible damage is by an improper application of a large dose to a small amount of grain and it would be by the merest chance, even if a chemical inspection were made, that such a small amount of grain would be contained or caught in the samples tested unless, it is going to be required that practically each bushel be separately tested before loading. This is obviously beyond the realities of the situation.

Petitioners at Pages 28-29 of their Brief quote certain testimony wherein the Court inquired as to the reason one of the inspectors did not take a sample immediately after the incident in question. We can scarcely see the purpose of quotation of this testimony. The taking of a sample at such time would not have forestalled or prevented the incident. In this connection, the testimony is undisputed that the reason that the Galveston Wharves did not test a sample of the grain after the alleged incident, was that according to the Wharves records, which were checked at that time no fumigated grain had been put aboard the GRELMARION (R. 592 and R. 1036).

**THE TRIAL COURT CORRECTLY FOUND  
THAT ANY ADDITIONAL INSPECTIONS  
WOULD HAVE BEEN UNAVAILING.**

The Trial Court found "I find that had additional inspections been made by the Respondent City, there is no reason to believe that such inspections would have been more successful". (Finding No 16).

As shown by the above statement, many and continuous inspections were made. Chloropicrin, if properly applied in an inland elevator, would cause no damage. It is only when a large amount of chloropicrin is poured upon a very small amount of grain that any possibility of fumes arise. Considering the millions upon millions of bushels of wheat that go through the elevator, unless each and every bushel is going to be separately and chemically tested (which is obviously beyond the practical realities of the situation), further inspection would not have in reasonable expectation been of any help or more successful.

All of the above argument demonstrates the correctness of the Trial Court's findings of fact that the City did not fumigate the grain, that it had no reason to expect or believe that improper fumigation had occurred in any inland elevator, that it was not negligent in failing to discover an excessive and improper dose of chloropicrin on a very few bushels of wheat, that it reasonably inspected the grain that came to the elevator and that additional inspections would have been unavailing and that as a matter of fact, the City was guilty of no act of negligence. Additionally, we

respectfully submit that under the doctrine of the **McAllister** case, the findings of fact made by the Trial Court and approved by the Court of Appeals were proper and justified and in no event, can be considered clearly erroneous.

The Trial Court was correct as a matter of law. The grain handled by the elevator is received from inland carriers and held in transit for export aboard water carriers. The City is not the owner of the grain, the Louis Dreyfus Corporation being the owner (R. 1133). Through many years of operation, many millions of bushels of wheat have been exported through Galveston and other ports of the United States and so far as is known, this is the first time that improper inland fumigation may have caused an injury. The City had no notice of any such condition and in the absence of specific notice, was entitled to presume that the grain reaching it was in proper condition.

The rule is well settled that any handler of a commodity in commerce whether it be bailee, warehouseman, carrier or otherwise has the right to presume, in the absence of information putting him on notice to the contrary, that the commodity tendered to him is in good condition and safe for handling. This rule was first established in **Parrott vs. Barney**, 1 Sawyer 423, 18 Fed. Cases Pg. 1236, Federal Case No. 10773 (Cir. Ct. Calif.) wherein, in a case involving nitroglycerine, Mr. Justice Sawyer held that a person handling goods in the regular course of business had the right to presume that they were not dangerous unless suspicious circumstances were shown.

Mr. Justice Sawyer further held in that case that there was nothing to put the carrier on notice of the hazard and that the carrier was not guilty of negligence. The case then came to this Court and is reported as "**The Nitroglycerine Case**", 15 Wallace 524, 82 U.S. 524, 21 L.Ed. 206. This Court in an opinion by Mr. Justice Field held that carriers had a right to presume that the goods offered were in good condition and not dangerous and that, until notice to the contrary was received, had a right to rely upon such facts. This Court further held that no liability existed on the carrier in that case.

The uniform holdings since the Nitroglycerine Case have been in accord with this rule. See **Mainwaring vs. Bark Carrier Delap, etc.**, 1 Fed. 874 (D. C. New York), and **Craine vs. Oliver Chilled Plow Works**, 280 Fed. 954 (CCA 9th). While the above cases relate primarily to carriers, nevertheless, this same principle is true as to other handlers of goods in the channels of commerce. In the absence of notice, the City is entitled to presume that the wheat shipped to it is not injurious to humans and is further entitled to presume that its own handling of the cargo by the accepted and universally practiced method of handling will not be injurious to humans. Over a period of many years, millions of bushels had gone through Elevator B. Fumigants applied inland had never before caused any difficulties. The uniformed practice of the industry was followed. No facts were known which would put the City upon inquiry. Under these circumstances and under the above authorities, the City was not negligent.

## **SECOND COUNTER PROPOSITION**

**THE TRIAL COURT'S FINDINGS OF THE AMOUNT OF DAMAGES SUSTAINED BY EACH OF THE PETITIONERS WAS ADEQUATE.**

### **STATEMENT AND ARGUMENT**

Petitioners' Proposition No. 5 is that the Trial Court's award of damages was clearly erroneous and inadequate. So far as we can find, Petitioners make no record references to support their argument.

In order to determine the adequacy of the finding as to damages, it is necessary to consider the testimony of each Petitioner and the testimony of four doctors and certain exhibit testimony as to earnings. The testimony of the various Appellants is found at the following pages in the record: Morales, 23-118; Majia, 118-183; Arrendondo, 183-219; DeLeon, 399-428; Balli, 429-443; Serrato, 444-458; A. Ovalle, 458-469; and J. Ovalle, 516-543.

The medical testimony is found: Dr. Adriance, R. 469-514; Dr. Jenkins, R. 328-359; Dr. Futch, R. 1066-1119; and Dr. Mendell, R. 725-794.

Petitioners have made no effort in any way to review this testimony. Their whole argument is apparently based upon two thoughts: (1st) They assert that the amount of compensation plus medical paid by the employer's insurance carrier is approximately one-half to 70% of the total amount of the damages allow-

ed by the Court; and (2nd) that there was a drop in the overall earnings of each Petitioner when comparing the year 1956 (prior to the accident) and the year 1957, the year of the accident. Based upon these two ideas alone, Petitioners seek to overturn the fact finding of the Trial Court as to damages.

As to the first basis of Petitioners, i. e., their contention that the amount of compensation paid by the insurance carrier plus medical runs about one-half to 70% of the total award, the amount of compensation paid and the period for which paid, of course, are not admissible in this case. The amounts were paid voluntarily by Petitioners' employer's compensation carrier. Whether they were paid because the insurance company thought the amounts reasonable or to avoid the expenses of litigation or whether they were paid for some other reason is not material here because the amount so paid is not admissible in this case. We have had no right to cross-examine as to the reasons, facts or basis of such payments. We were not parties to such payments and did not consent to them. Under no circumstances can the voluntary payments made by way of compensation be used as evidence of damages in a third party action—see **Meyers vs. Thomas**, 186 S. W. (2d) 811 (Tex. Sup.) and **Johnson vs. Willoughby**, 183 S. W. (2d) 201 (Tex. Civ. App.—error refused).

The second argument, i. e., a decline in earnings during the year of the accident as compared to the previous year, equally affords no basis for Petitioners' contention. Each of Petitioners belongs to the Banana

Local, which is independent from the longshoremen (R. 57). Insofar as longshore work other than bananas is concerned, they therefore take only what is left as far as work is concerned. The reduction in earnings in 1957 under the state of this record proves nothing in that the real reason for loss of income to Petitioners during the year 1957 is explained by the record. First taking the banana longshoremen earnings for the years 1956 and 1957, we find no decrease in earnings and in fact, an overall increase. As shown by Petitioners' Exhibit 10, Petitioners income from longshoring bananas for the years 1956 and 1957 are as follows:

NAME	Banana Longshoring Income 1956	Banana Longshoring Income 1957
Jesse Ovalle	\$ 1,784.37	\$ 1,749.54
Fidencia Balli	\$ 1,762.25	\$ 2,143.64
Juan Arrendondo	\$ 1,992.10	\$ 2,058.37
Miguel Mejia	\$ 1,131.03	\$ 1,154.06
Robert Morales	\$ 1,767.89	\$ 1,808.90
Nick DeLeon	\$ 1,840.70	\$ 1,805.83
Apolonia R. Ovalle	\$ 1,725.04	\$ 1,790.26
Michael Serrato	\$ 231.44	\$ 1,436.77
	<u>\$12,234.82</u>	<u>\$13,947.37</u>

The other substantial source of Petitioners income during the year 1956 was grain longshoring. As shown by City's Exhibit GG, the Galveston Wharves loaded forty-four and one-half million of bushels aboard 191 ships during the year 1956. In 1957, the

Wharves loaded thirty-two and one-half million of bushels aboard 147 ships (R. 977). In other words, the loss in grain longshoring work was due to a decline in shipments.

The testimony sustains the findings of the Court.

Dr. Carroll-Adriance testified that he treated the Petitioners, Morales, Arrendondo, DeLeon, Mejia, Ser-rato, A. Ovalle, J. Ovalle and Balli; that he did not believe that any of the Petitioners suffered liver damage (R. 497-498); and that he thought that all of them had recovered at the end of a two or three months period (R. 499-500).

Also, a brief analysis of the additional testimony as to each claimant will demonstrate the correctness of the Court's findings. The Petitioners are discussed here in the order as listed on their Exhibit #10 in the Trial Court:

1. Jesse Ovalle. On trial, this witness claimed a partial disability of from 7 to 10 weeks but during that time worked on banana boats and grain boats (R. 526-527); he did not remember how long after the incident it was that he worked his first grain boat in this 7 to 10 weeks but during that time worked on banana boats and grain boats (R. 526-527); he admitted that after three months he worked regular (R. 528); he worked a banana boat on March 16th, two days after the accident; and another banana boat on March 18th (R. 529-530). At the time of the trial, he was working every kind of boat (R. 532). Dr.

Futch testified that his liver function tests were all within normal limits (R. 1082); that he last saw Mr. Ovalle on June 11, 1957 (R. 1081); that he did not find him suffering from any condition attributable to the incident of March 14, 1957 but on the other hand did find a spinal condition of abnormality which would be consistent with the complaints he was then having (R. 1082-1083).

2. Fidencia Balli. This Petitioner only claimed to have been off 14 days (R. 436). However, he worked a banana boat on March 16th, 2 days after the accident (R. 439) and subsequently worked other banana boats (R. 339-440). During this 14 days, he earned \$116.74 working banana boats (Ex. KK).

3. Juan Arrendondo. This Petitioner claims to have been off work for 8 weeks (R. 194). However, he worked a grain boat within 2 days after the accident (R. 198) and continued to work them regular (R. 212).

4. Miguel Mejia. This Petitioner claimed to have laid off about 3 months (R. 137). However, he worked a banana boat a day or two after March 14, 1957 (R. 150). According to Dr. Futch, who examined this Petitioner between May 27th and June 3, 1957 (R. 1073), at the time of such examination, he found no residue of any damage alleged to have been caused by the incident of March 14 (R. 1073-1074) but he did find a functional digestive disorder (R. 1074).

5. A. R. Ovalle. The testimony with respect to this Petitioner is a little confusing. He first testified that "maybe so" he lost 4 months but when asked if he did not work during these four months, he stated "yes" and that he worked grain and flour; that in April, 1957, he worked bananas and grain; that in May, he worked boats other than bananas (R. 464); and that during the latter part of March, 1957, he worked flour, grain and sulphur (R. 465). He admitted to working banana boats on March 16, 18, 22, 27 and thereafter regularly on banana boats as they came in (R. 476-467). He also admitted that after the incident of March 14th, he worked grain boats (R. 467); in answer to another question, he stated that the first time he worked a grain boat was in the last days of May, 1957 (R. 468) but he admitted of working one or two grain boats at the end of March, 1957 (R. 468). Dr. Futch testified that he saw this Petitioner on May 31, 1957; that he found no evidence of liver damage; that the liver function tests were normal (R. 1078-1079); that there was no residual damage (R. 1080-1081) but that he did find other conditions which would explain the patient's complaints, i. e., a mild cervical osteo-arthritis (R. 1081).

6. Michael Serrato. This Petitioner claimed to have been off 2 or 3 months from work. However, he commenced working banana boats regularly 4 days after the accident (R. 454); he worked banana boats regularly during April and May and admitted that during this time, the banana boats were the only boats that were in Galveston that he could work on then (R. 455); the witness also admitted that after the end

of this approximately two months period, he worked in grain (R. 451).

7. Robert Morales. This Petitioner admitted to working grain boats the first or second day after the accident (R. 69); he worked several banana boats during the rest of March (R. 70) and he admitted to working regularly after November, 1957 (R. 114). Dr. Futch testified that on May 27, 1957 at the time of his examination, there was no evidence of liver damage (R. 1057) but that he did find thyroid trouble (R. 1076) but that exposure to a toxic gas would not affect a thyroid (R. 1077) and that there was no connection between fumigants and thyroid. Dr. Futch further testified that he did not find any evidence of residual damage that could have been caused by the episode of March 14, 1957 (R. 1077).

8. Nick DeLeon. This Petitioner testified that for about 8 months, he had very little work (R. 416) but again admitted that he worked a grain boat 3 or 4 days after March 14 (R. 420); that he worked 3 or 4 ships of grain during the eight month period and has worked them regularly since (R. 421). He also admitted to working a banana boat 2 days after the accident, another one 4 days after that, and continuously from that time (R. 422). Dr. Futch testified that he saw Mr. DeLeon about June 3, 1957; that he found no residual damage to the liver (R. 1084) but he did find a condition which would have accounted for the symptoms being complained of, i. e., high blood pressure (R. 1085).

In addition to the above, Dr. Futch testified with respect to each one of the Petitioners examined by him. He found no evidence of residual damage (R. 1087); he did not attribute any of their complaints at the time of his examination to the incident of March 14 (R. 1110).

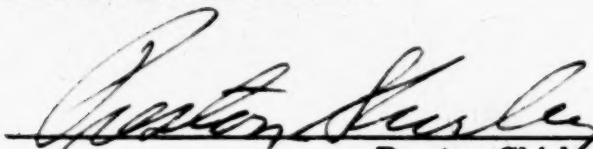
The above does not purport to be a complete resume of all testimony in the record on the issue of damage. It is reviewed here only to show that there was more than ample evidence to sustain and in fact require the Trial Court's findings. It is submitted that the evidence amply demonstrates that there is no basis for Petitioners' contention that the findings of fact as to damages are inadequate and clearly erroneous.

## CONCLUSION

In conclusion, we respectfully state to the Court that the findings of the Trial Court, approved by the Court of Appeals, are amply sustained by the evidence and in any event cannot be considered as clearly erroneous. Independent of any question of how this Court may determine the applicability of the doctrine of unseaworthiness in the controversy between Petitioners and the Respondent, Cardigan Steamship Company, Ltd., we respectfully state that as to us, the judgment of the Trial Court should be in all things affirmed and we so pray.

Respectfully submitted,

**McLEOD, MILLS, SHIRLEY & ALEXANDER  
PRESTON SHIRLEY**

A handwritten signature in cursive script, appearing to read "Preston Shirley", is written over a horizontal line.

Preston Shirley  
801 Santa Fe Building  
Galveston, Texas

**ATTORNEYS FOR RESPONDENT,  
CITY OF GALVESTON**

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Office-Supreme Court, U.S.  
**FILED**

APR 13 1962

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1961  
NO. 480

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ROBERT MORALES, ET AL., *Petitioners*  
v.  
CITY OF GALVESTON, ET AL., *Respondents*

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Brief on the Merits for Respondent Cardigan  
Shipping Company, Ltd.

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**Brief on the Merits for Respondent Cardigan  
Shipping Company, Ltd.**

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**STATEMENT OF THE CASE**

This libel in Admiralty was brought by Robert Morales and seven other longshoremen as a third-party action against the City of Galveston, owner and operator of a grain elevator, and Cardigan Shipping Company, Ltd., owner and operator of the British Steamship *GRELMARION*. Libellants alleged that while employed by a contract stevedore (not a party to this action) and engaged in trimming bulk grain being loaded from the elevator onto the *GRELMARION* they were overcome by noxious gases from a fumigant which had been used on the grain. Charges of negligence were made against the

City as owner-operator of the elevator and of negligence and unseaworthiness against Cardigan as owner-operator of the GRELMARION.

Trial before the District Court for the Southern District of Texas, Galveston Division, resulted in a decree for the respondents (181 F.S. 202, 1961 AMC 2199). That decree was affirmed by the Court of Appeals for the Fifth Circuit on February 22, 1960 (275 F. 2d 191). On the initial petition for Writ of Certiorari the Court entered a Per Curiam Order on December 17, 1960 which read "The judgment of the Court of Appeals is vacated and the case is remanded to that Court for consideration in the light of *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539". (364 U.S. 295, 5 L. Ed. 2d 84). Upon that reconsideration the Court of Appeals reaffirmed, in a new opinion, its earlier conclusion that the District Judge had not erred in finding no unseaworthiness (291 F. 2d 97, 1961 AMC 2194). On a second petition to this Court Certiorari has again been granted (368 U.S. 816, 7 L. Ed. 2d 23).

This respondent assumes, and it trusts correctly, that the principal if not the sole concern of this Court on the present hearing is with the issue of "seaworthiness", and particularly with the contexture of that question which may be regarded as following from *Mitchell v. Trawler Racer*, supra. The instant petition for Writ of Certiorari, and the petitioners' brief on the merits, are not so limited and present as well extended arguments against both respondents rested solely in negligence and against the respondent Cardigan for unseaworthiness founded in negligence.

As the brief for the City of Galveston will have dealt at length with the fact question of sole concern to it, and

described the handling of the grain up to the point of delivery into the vessel from the elevator's spout, those details and the related arguments will not be repeated in this brief at any length.

## **THE ARGUMENT**

### **A. The Facts of the Case**

The S/S GRELMARION was a dry-cargo vessel of conventional design and one of a large number of vessels engaged in carrying export grain from the ports of the United States. On this particular voyage she lifted 161,000 bushels of No. 2 yellow corn and 186,000 bushels of No. 1 hard winter wheat for delivery to India, and loaded this cargo at the large ship-side elevator operated by the respondent City. Prior to loading the GRELMARION was "fitted-out" for bulk grain in the usual way, with shifting boards, bins, and feeder boxes, and the ship and these fittings were inspected and approved by a surveyor for the National Cargo Bureau who certified that they conformed to the applicable Coast Guard Regulations. (R. pp. 983, 985, and 990; Cardigan Exhibit 3). All bins were found to be of standard type construction, including the 'tween deck bin in which petitioners were working at the time of the incident in suit (R. p. 985). This bin was formed by a center-line partition or bulkhead and received its grain from a feeder-box in the square of the hatch at one end of the bin. The approximate dimensions of the bin were 28 feet by 22 feet, and the height 9 feet. (cf. R. 249-259 and 374-375).

As described by petitioners they would "beam-out" this grain by pulling it away from the feeder-box and into the further corners of the bins. When they stopped work at

noon the bin was approximately three-fourths full and nothing unusual had happened (R. pp. 41-42). After eating, the petitioners and others re-entered the bin and signalled for a "shot" of grain from the elevator spout in order to resume work. As this first shot of new grain entered their bin the petitioners almost immediately noticed something was wrong, the first symptom being a burning or smarting of their eyes which made tears come (cf. R. pp. 44-46, 279-281). In the words of the gang's "pusher" Sheridan:

"Well, in other words, when that grain come in there, there was something unusual about it. I had never had the experience of that kind of stuff before, and I didn't know what was happening to us." (R. 280).

Several points were undisputed, even by the petitioners' evidence: Until the event last recited this loading had been without incident related in any way. All prior grain received on the ship (and this included almost the entire cargo) was completely free from noxious odors or gases of any kind. No fumigation procedures had been carried out on the ship either to prepare the ship for her cargo or during the loading. Whatever the source of any noxious fumes affecting the petitioners those fumes came directly off this "shot" of grain as it entered the ship's bin from the elevator's spout.

It was equally undisputed that the GRELMARION and her fittings were not only usual and standard but were entirely suitable for the purpose of receiving this cargo of grain and for the engagement of the petitioners in trimming that cargo. The petitioners own testimony made it abundantly clear, as the Trial Court found (Finding of

Fact 9, 10, 11, 17 and 18),<sup>1</sup> that absent those gases which came directly off the grain as it entered the bin this loading operation would have proceeded to a normal and uneventful conclusion.

As both petitions for Writ of Certiorari filed in this case, and even now the petitioners' brief on the merits, make repeated references to the absence of a blower-system for ventilation of the cargo bin (cf. Petitioners' Brief pp. 12, 30) it becomes necessary to point out that no one, including petitioners and their own witnesses, gave any testimony to indicate that "blowers" should have been used to ventilate such cargo bins during loading, or even to suggest that it would have been practical to do so. (R. pp. 63, 107-108, 293-294). Petitioner is in error in stating (Petitioners' Brief p. 12) that the Trial Court did not make any Finding of Fact on the failure of Cardigan to use blowers to force air into the hatch since the Court's Finding of Fact 17 expressly stated "While the GRELMARION cargo spaces were not equipped with forced ventilation system, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary" (181 F.S. at 206).

To conform this argument to the record it is also necessary to point out that Petitioners' Brief (at p. 30) again

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<sup>1</sup> Note as to the Numbering of the Trial Court's Findings of Fact: In the published report of this case before the District Court the Findings of Fact relating to liability are numbered consecutively "1" through "18". However, in some transcription of these Findings of Fact the number "13" was not used and all paragraphs subsequent to "12" were given a number one higher than appropriate. In this brief the Findings of Fact will be referred to as they appear in the printed report. It is noted that in Petitioners' Brief the higher number is used, and the references therein to Finding of Fact "19" are to the Finding of Fact numbered as "18" in the printed report.

has repeated the statements that "Coast Guard books and literature available to the shipping industry show what measures should and could be taken in the event of an occurrence such as occurred here" and for that reason Cardigan was under a duty "to provide either forced ventilation or blowers for the very purpose of preventing asphyxiation and the danger to Petitioners". These statements are completely without foundation in any testimony or exhibits offered at the trial and apparently and solely relate to a manual which libellants' counsel had in possession showing ventilation procedures recommended to be followed *when fumigation had been carried out aboard a ship*. The use of this manual was dropped at the trial since it was apparent that it related only to that special situation which was not true on the GRELMARION. A picture of a "blower-system" taken from the manual was resurrected as "Appendix G" in the first petition for Writ of Certiorari to this Court. While this Respondent contends that these questioned statements are not only misleading but are also not properly a part of the Record in this case, unless these premises are conceded by the Petitioners it is respectfully submitted that this "new evidence" should be placed before the Court in its entirety so that its lack of application to the circumstances here can be correctly evaluated.

A final consideration as to the facts of the case concerns the reference in Petitioners Brief (by emphasis added at p. 7, and at pp. 12, 20, 21 and 30) which would suggest that the petitioners were *asphyxiated* because the flow of grain cut off their supply of oxygen. All of the evidence showed, and the Court found (Finding of Fact 11, 181 F.S. at 205) that this was not the case and that any damage suffered by the petitioners was an intoxication caused by the fumes of chloropicrin coming off the grain.

## B. The Law of the Case

In stating the position of this respondent it is assumed and understood that a ship may be rendered unseaworthy by a condition which is only temporary or transitory, and that the ship-owner's notice of this condition, either actual or constructive, is not essential to his liability. However, the questions remain whether, under the facts of this case, it should be found that an unseaworthy condition was present and that this was the cause of injury.

Whether the GRELMARION and her appurtenances were "reasonably suited for their intended use" was a question resolved by the Trial Judge in these terms:

"(17) I find that the GRELMARION'S cargo spaces were of customary design and construction; that they were clean, and in all respects ready to receive the wheat; and had been surveyed and approved prior to loading. No fumigation for weevils was made aboard the vessel, and none was necessary. While the GRELMARION'S cargo spaces were not equipped with forced ventilation systems, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary, I find that the vessel was not unseaworthy in any respect or particular, and that her Captain, crew, agent or other representatives were not negligent in any particular.

"(18) The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last "shot" of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. Under these circumstances, I find that the admission thereof into the bin of the vessel did not cause the GRELMARION to become unseaworthy, the vessel and all its appurtenances being entirely ade-

quate and suitable in every respect". (181 F.S. at 206-207)

Unlike *Mitchell v. Trawler Racer*, *supra*; *Grzybowski v. Arrow Barge Co.*, 283 F. 2d 481 (4th Cir., October 1960); *Knox v. United States Lines*, 294 F. 2d 354 (3rd Cir., June 1961), and other cases where a jury's verdict has been set aside because the guiding principles were erroneously stated, in the instant case there is no indication that the conclusion of the Trial Judge as to seaworthiness was rested on faulty premises. Petitioners' Proposition is that under the facts here related and as found by the Trial Court the opposite conclusion was required as a matter of law. To a considerable extent the emphasis of that argument is taken from the choice of language used by the Court of Appeals (in the first hearing of this case, 275 F. 2d 191), particularly:

"This is a case of a happening 'when the last batch of wheat came out of the funnels' instantaneously rendering unfit quarters which until then had been, and, when the funnels cleared away, continued to be entirely seaworthy."

These are words which originated with the Court of Appeals and were not words "quoted with approval" from the District Court as stated by Petitioners' Brief, at page 16. While under the circumstances they would not appear to have any significance in the present posture of the case Judge Hutcheson did clarify his meaning in his second opinion (291 F. 2d 97) when he elaborated:

"Here the vessel was *at all times* staunch and fit for the service intended, the reception of grain which did not contain dangerous chemicals, and since it was not intended or expected that grain so contaminated

would be loaded into the bins, the ship was *at all times* seaworthy and fit for its service of receiving uncontaminated grain." (Emphasis added) (291 F. 2d at 98).

In *Mitchell* the slime and fish gurry which made the ship's rail unseaworthy was a normal by-product of the intended service of the vessel. In the *Grzybowski* case the soap was applied to skids as an aid in handling the cargo of steel. In the *Knox* case the collapse of tiers of burlap rolls was a normal concomitant of the carriage of that kind of cargo, as was the collapse of the cargo of potash in *Holley, Admx. v. S.S. Manfred Stansfield*, 186 F.S. 212, 1960 AMC 1956 (E.D. Va. 1960), a case cited in Petitioners' Brief at pp. 16, 20.

A similar if not identical distinction is readily seen in the cashew-nut oil cases, *Valerio v. American President Lines*, 112 F.S. 202 (S.D. N.Y. 1952) and *Anderson v. Lorentzen*, 160 F. 2d 173 (2nd Cir. 1947), cited by Petitioners, since a cashew-nut oil cargo was inherently dangerous to those handling it without appropriate precautions. Of a like characteristic was the carbon tetrachloride used in the *Halecki* case (*United N.Y. & N.J. Sandy Hook Pilots Assn. v. Halecki*, 1959, 358 U.S. 613, 3 L. Ed. 2d 541).

In the instant case the Trial Court found, on sufficient evidence, not only that the direct cause of any injury to the Petitioners was a vice in the cargo itself, but also that the presence of this alien gas in the wheat was neither a normal nor to be foreseen characteristic of that cargo. Petitioners' Counsel obviously anticipated the dilemma in which this element of the case would place not only the theory of negligence but also the theory of unseaworthiness since the arguments are here repeated concerning four "similar" incidents of which the parties had

notice. However, as the Trial Court determined (Findings of Fact 12 and 16), the last of these incidents was in 1953, some years previous to the incident in suit, and, unlike the present case of a residue of chloropicrin from negligent fumigation at an inland point (Findings of Fact 12, 13 and 14), those previous cases charged negligent fumigation in the City's own elevator.

In summary, the Petitioners have not brought themselves within the specifications for liability which were announced in the *Mitchell* case, or which may be found in any other case in this area of the maritime law. A contrary conclusion could only be reached if the shipowner's absolute warranty does extend to the freedom of all cargo from conditions which might cause injury. This rule has not been stated in this Court or any other.

Under a separate proposition Petitioners' Brief urges the negligence of both respondents for failing to test the grain between the elevator bins and the ship's hold so as to detect the presence of the injury-causing chloropicrin gas. The errors in that argument, and in the facts given in support, have already been noted in some part. No sufficient reason is offered by Petitioners for disturbing the clear and detailed judgment of the Trial Court on this issue. On this the Court of Appeals said:

"Careful consideration of, and reflection on, the claims and arguments of the opposing parties, in the light of the record and the controlling authorities, leaves us in no doubt that, as to the charges of negligence, there is no basis whatever for the attack here upon the findings as clearly erroneous. Indeed, we are convinced that, under an impartial and disinterested view of the evidence as a whole, the findings are well supported and wholly reasonable.

—275 F. 2d at 193.

Overall, and with the facts of this case fairly viewed, the decree for the shipowner fully conformed to the settled principles of the maritime law, including those stated in *Mitchell*. Neither the fact that an accident did occur, nor that it occurred from a transitory, even instantaneous cause, was sufficient without more, to establish unseaworthiness as the cause of injury. The vessel and her appliances remained reasonably fit for the use to which they were put. No more was required.

*Blier v. United States Lines Co.*, 2d Cir. 1961, 286 F. 2d 920, 1961 AMC 1134, cert. den. 368 U.S. 836, 7 L. Ed. 2d 37;  
*Hooper v. Terminal S.S. Co.*, 2d Cir. 1961, 296 F. 2d 281;  
*Morrell v. United States*, 9th Cir. 1961, 297 F. 2d 662.

### CONCLUSION

For the foregoing reasons, Respondent Cardigan Shipping Company, Ltd., prays that the judgments of the District Court and the Court of Appeals be affirmed.

Respectfully submitted,

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 CLARENCE S. EASTHAM  
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By \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing brief has been mailed this \_\_\_\_\_ day of April, 1962 to Arthur J. Mandell, Esq., South Coast Building, Houston 2, Texas, Attorney for Petitioners, and to Preston Shirley, Esq., Santa Fe Building, Galveston, Texas, Attorney for Respondent City of Galveston.

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# SUPREME COURT OF THE UNITED STATES

No. 480.—OCTOBER TERM, 1961.

Robert Morales, et al.,	} On Writ of Certiorari to the	
Petitioners,		United States Court of Ap-
v.		peals for the Fifth Circuit.
City of Galveston et al.		

[June 11, 1962.]

MR. JUSTICE STEWART delivered the opinion of the Court.

On the afternoon of March 14, 1957, the *S. S. Grelmarion* was berthed at Galveston, Texas, taking on a cargo of wheat from a pierside grain elevator owned and operated by the city. The wheat was being loaded directly from the elevator into the ship by means of a spout. The petitioners were longshoremen engaged in "trimming" the wheat as it was received in the off-shore bin of the vessel's No. 2 hold, which was then about three-quarters full. A last "shot" of grain was called for and was released into the bin. The grain in this last shot had been treated with a chemical insecticide, and the petitioners were injured by fumes from the chemical, made noxious by concentration in the closely confined area where they were working.

The petitioners brought the present suit against the City of Galveston and the owner of the vessel to recover for their injuries.<sup>1</sup> Their claim was predicated upon the negligence of the city and the shipowner, and upon the unseaworthiness of the ship. After an extended trial, the District Court entered judgment for the respondents.

<sup>1</sup> Petitioners of course received compensation and medical treatment under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* 181 F. Supp., at 207.

based upon detailed findings of fact, 181 F. Supp. 202, and the Court of Appeals affirmed, 275 F. 2d 191. On certiorari (364 U. S. 295) we vacated the judgment and remanded the case to the Court of Appeals for consideration in the light of *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, which had been decided in the interim. That court, one judge dissenting, was of the view that *Mitchell* was inapplicable to the facts of the present case, and again affirmed the District Court's judgment, 291 F. 2d 97. We granted certiorari to consider a seemingly significant question of admiralty law. 368 U. S. 816.

The factual issues bearing upon the alleged negligence of the city and shipowner were determined in their favor by the District Court. Specifically, the court found that the city had *not* itself applied the fumigant to the grain in question, and that neither of the respondents knew, or in the exercise of reasonable care could have known, that the grain had been improperly fumigated at an inland point by someone else.<sup>2</sup> Even a cursory examination of

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<sup>2</sup> "14. I find that neither of the respondents knew, or in the exercise of reasonable care should have known, that this quantity of grain, which had been improperly treated with an excessive amount of fumigant, was in the elevator or loaded aboard the *Grelmarion*; and that (for all the evidence shows here) the respondent city, in the operation of its elevator, had never received knowledge of a prior instance where chloropicrin or other fumigants applied at inland elevators had adhered to the grain sufficiently long as to present danger after receipt by the elevator.

"15. I find that the respondent city was not negligent in failing to know or learn of the presence of this quantity of grain within its elevator, in failing to make some additional inspection therefor, or in any other particular. The record shows without dispute that careful and painstaking inspections and examinations were made under governmental authority when the grain was received, and again as it was disbursed by the elevator, which in the present instance failed to detect the presence of the remaining traces of fumigant in this quantity of grain. I find that had additional inspections been made by

the lengthy record shows that these findings were based upon substantial evidence. They were re-examined and affirmed on appeal.<sup>3</sup> We cannot say that they were clearly erroneous. *McAllister v. United States*, 348 U. S. 19, 20-21.

Of greater significance in this litigation is the issue which prompted our remand to the Court of Appeals for reconsideration. Briefly stated, the question is whether, upon the facts as found by the District Court, it was error to hold that the *Grelmarion* was seaworthy at the time the petitioners were injured.<sup>4</sup>

In the *Mitchell* case, *supra*, we reversed a judgment for the defendant, because the District Court and the Court of Appeals had mistakenly imported concepts of

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the respondent city, there is no reason to believe that such inspections would have been more successful.

"17. I find that the *Grelmarion's* cargo spaces were of customary design and construction; that they were clean, and in all respects ready to receive the wheat; and had been surveyed and approved prior to loading. No fumigation for weevils was made aboard the vessel, and none was necessary. . . . I find . . . that her Captain, crew, agent, or other representatives were not negligent in any particular." 181 F. Supp. 202, at 206-207.

<sup>3</sup> "Careful consideration of, and reflection on, the claims and arguments of the opposing parties, in the light of the record and the controlling authorities, leaves us in no doubt that, as to the charges of negligence, there is no basis whatever for the attack here upon the findings as clearly erroneous. Indeed, we are convinced that, under an impartial and disinterested view of the evidence as a whole, the findings are well supported and wholly reasonable." 275 F. 2d, at 193.

<sup>4</sup> The District Court and the Court of Appeals, without discussion, proceeded upon the assumption that the petitioners belonged to the class to whom the respondent shipowner owed the duty of providing a seaworthy vessel. This was correct. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc., v. Hawk*, 346 U. S. 406.

common-law negligence into an action for unseaworthiness. There the jury had erroneously been instructed that liability for unseaworthiness could attach only if the alleged unseaworthy condition was "there for a reasonably long period of time so that a shipowner ought to have seen that it was removed."<sup>5</sup> The Court of Appeals had affirmed on the theory that, at least as to an unseaworthy condition that arises during the progress of the voyage, the shipowner's obligation "is merely to see that reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect."<sup>6</sup> It was alleged in that case that a ship's rail which was habitually used as a means of egress to the dock was rendered unseaworthy by the presence of slime and gurry. We did not decide the issue, but reversed for a new trial under proper criteria, holding that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability, and that he has an absolute duty "to furnish a vessel and appurtenances reasonably fit for their intended use." 362 U. S., at 550.

In the present case the Court of Appeals was of the view that the trial judge's determination of the *Grelmarion's* seaworthiness at the time the petitioners were injured was in no way inconsistent with our decision in the *Mitchell* case. We agree. The District Judge did not, as in *Mitchell*, hold that unseaworthiness liability depends upon the shipowner's actual or constructive knowledge. He did not, as in *Mitchell*, indicate that liability may be excused if an unseaworthy condition is merely temporary. Rather, as the Court of Appeals pointed out, the trier of the facts found, upon substantial evidence, that "the cause of the injury was not any defect in the ship but the fact that the last shot of grain which

<sup>5</sup> 362 U. S., at 540-541, n. 2.

<sup>6</sup> 265 F. 2d 426, 432.

was being loaded was contaminated . . . 291 F. 2d, at 98.

The trial court found, upon substantial evidence, that what happened was an unexpected, isolated occurrence. Several years before there had been three, or perhaps four, incidents involving injury to longshoremen from grain *which had been fumigated by the city itself*. But at the time the present case arose the city had adopted a series of safety and inspection measures which made completely innocuous the grain which it fumigated, and "vast quantities of wheat and other grains had been loaded through the elevator, some eight to ten percent of which had been fumigated by the city, without similar incident in recent years." The court found that the fumes in the present case came from "chloropierin, an insecticide which had never been used by the respondent city." The petitioners question none of these findings here. Under these circumstances we cannot say that it was error for the court to rule that the absence of a forced ventilation system in the hold did not constitute unseaworthiness.<sup>9</sup>

A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be

<sup>7</sup> 181 F. Supp., at 205.

<sup>8</sup> *Ibid.*

<sup>9</sup> . . . While the Grelmarion's cargo spaces were not equipped with forced ventilation systems, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary . . .

"The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. Under these circumstances, I find that the admission thereof into the bin of the vessel did not cause the Grelmarion to become unseaworthy, the vessel and all its appurtenances being entirely adequate and suitable in every respect." 181 F. Supp., at 206-207.

defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc., v. Hawn*, 346 U. S. 406; *Alaska Steamship Co. v. Petterson*, 347 U. S. 396; *Rogers v. United States Lines*, 347 U. S. 984; *Boudoin v. Lykes Bros. S. S. Co.*, 348 U. S. 336; *Crumady v. The J. H. Fisser*, 358 U. S. 423; *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U. S. 355. For any or all of these reasons, or others, a vessel might not be reasonably fit for her intended service. What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without. The trier of the facts ruled, under proper criteria, that the *Grelmarion* was not in any manner unfit for the service to which she was to be put, and we cannot say that his determination was wrong.

*Affirmed.*

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

# SUPREME COURT OF THE UNITED STATES

No. 480.—OCTOBER TERM, 1961.

Robert Morales, et al.,  
Petitioners,  
v.  
City of Galveston et al.

On Writ of Certiorari to the  
United States Court of Ap-  
peals for the Fifth Circuit.

[June 11, 1962.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

The District Court found that the libellants were injured in 1957 as a result of a release into the hold of a "shot" of grain that completely closed the hatch opening, which was the only source of ventilation for the hold in which they were working. This grain had been treated by chemicals for weevil infestation; and the noxious fumes from those chemicals injured libellants.

The vessel's cargo spaces were not equipped with a forced ventilation system. Grain vessels, the District Court found, rarely are so equipped; and it concluded that forced ventilation is "not necessary or customary." If this were an isolated instance of fumigated grain releasing noxious gases, no claim of unseaworthiness could be maintained. But this was not an isolated instance. Of the wheat loaded through this elevator, some 8 to 10% was fumigated by the city. Wheat is commonly fumigated either in the elevators or in railroad cars. When the fumigant is properly applied, the gases and fumes are dissipated so as not to be dangerous or harmful after 24 to 48 hours. The District Court found, however, that to the knowledge of the owners of the vessel several recent incidents like that in the present case had occurred in Galveston, causing injury to longshoremen—one in 1949, one in 1950, two in 1953.

A vessel without a forced ventilation system would be seaworthy if this injury were an unexpected, isolated occurrence. But I agree with Judge Rives of the Court of Appeals that the vessel and her appurtenances were not "reasonably fit for their intended use" (291 F. 2d 97, 99), where up to 10% of the grain loaded from this elevator was fumigated and where the owners had knowledge of like accidents. One "intended service" of this vessel was, therefore, the loading of fumigated grain which in the past had given off noxious fumes. Unseaworthiness by reason of the absence of a forced ventilation system is clearer here than it was in *Mitchell v. Trawler Racer, Inc.*, 362 U. S. 539, where temporary slime and gurry on the ship's rail rendered it unseaworthy. The unseaworthy condition in the present case had no such temporary span. What happened here shows that the vessel was unseaworthy whenever fumigated grain was being loaded.